

In the Supreme Court of the  
United States

OCTOBER TERM, 1948

No. 513

Office - Supreme Court

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CHARLES ELMORE

BURNHAM CHEMICAL COMPANY, a corporation,

*Petitioner,*

vs.

BORAX CONSOLIDATED, LTD., a corporation,  
PACIFIC COAST BORAX COMPANY, a corporation,  
UNITED STATES BORAX COMPANY,  
a corporation, and AMERICAN POTASH &  
CHEMICAL CORPORATION,

*Respondents.*

Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit  
and  
Brief in Support Thereof

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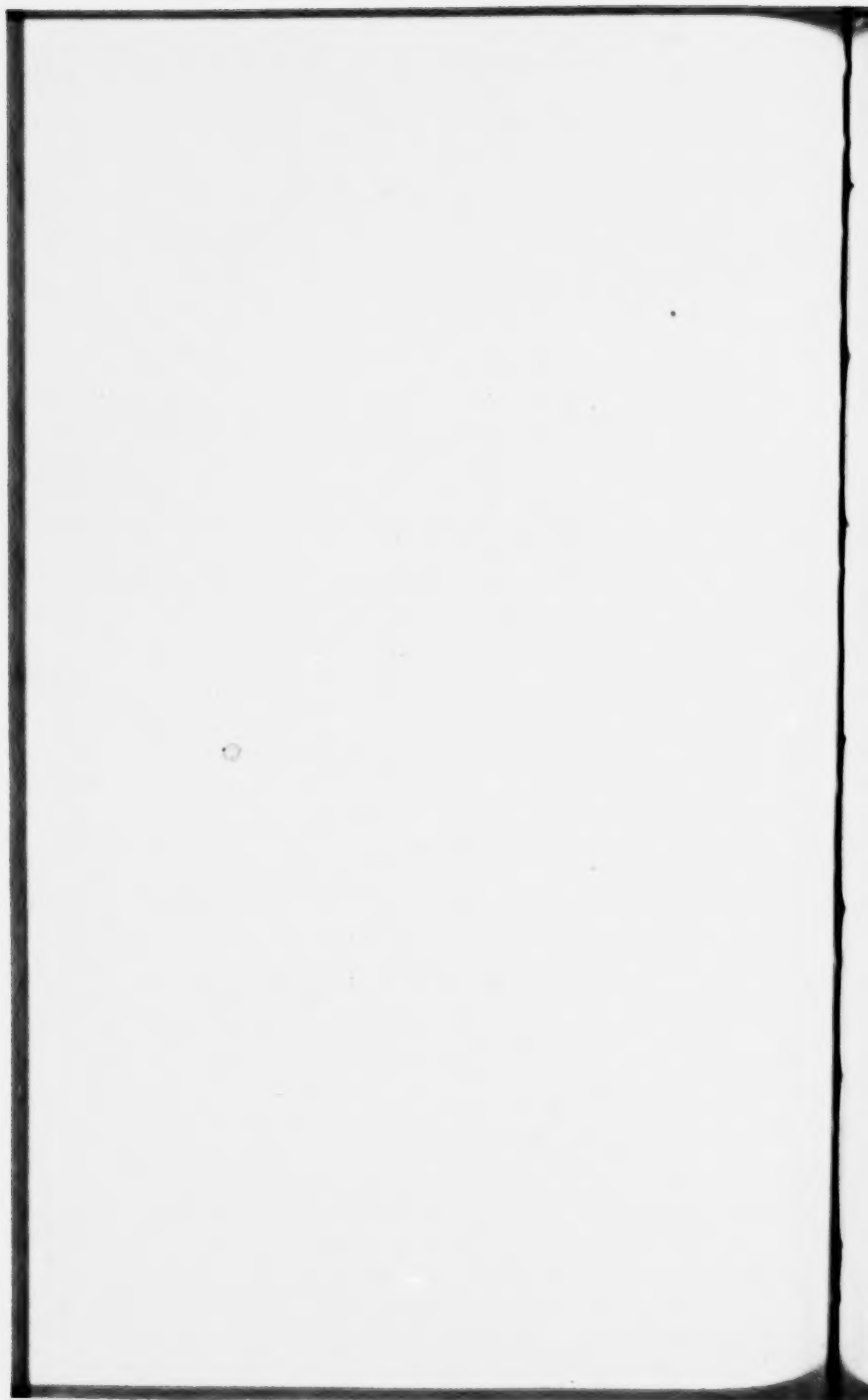
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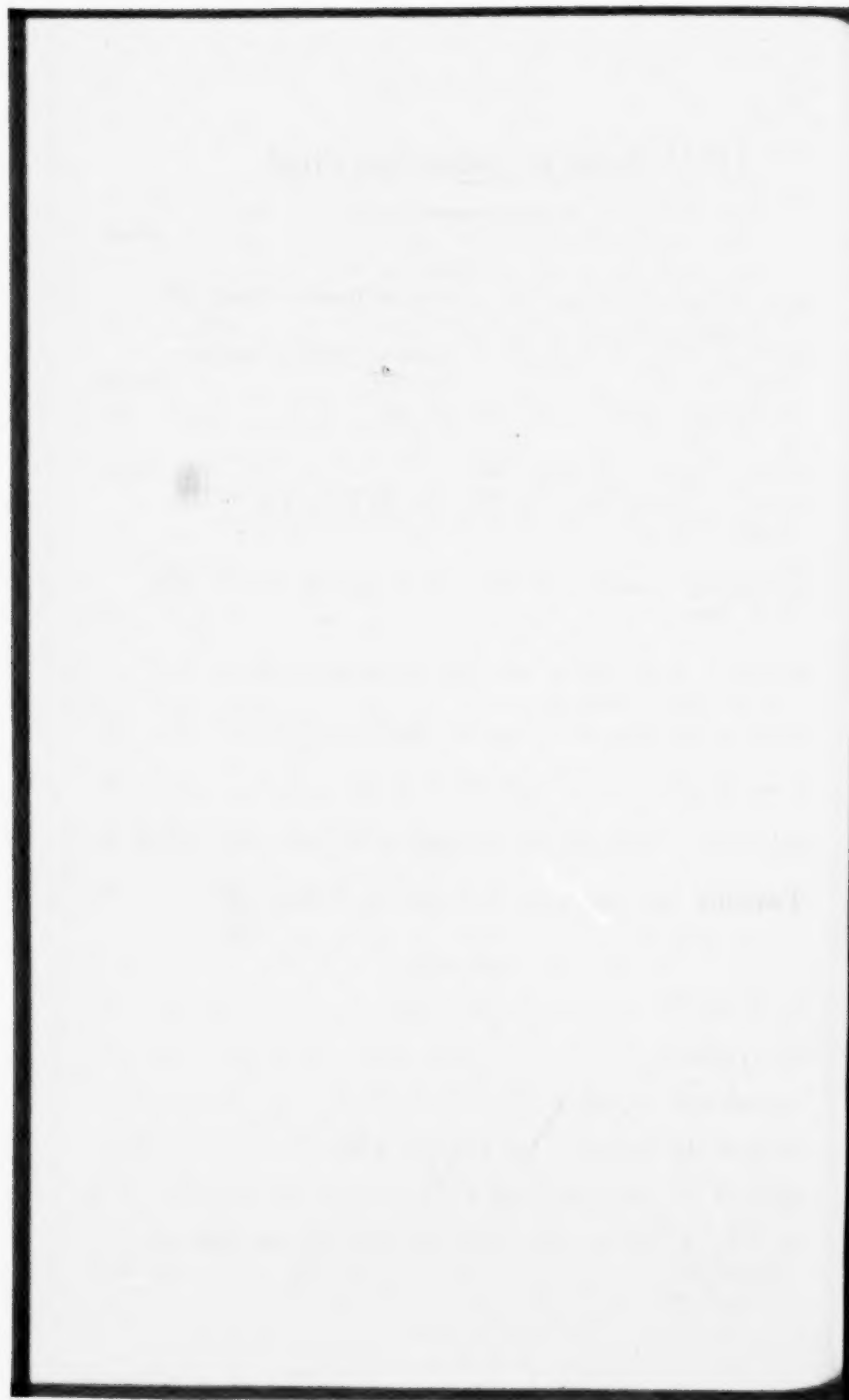
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## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Your petitioner, Burnham Chemical Company, respectfully prays for a writ of certiorari to the United States Court of Appeals in and for the Ninth Circuit to review the decision and judgment of the said court in the above-entitled case dated October 27, 1948.

### **I. SUMMARY STATEMENT OF THE MATTER INVOLVED**

The petitioner, Burnham Chemical Company (plaintiff below) prior to 1929 was in the business of mining, processing and marketing borax and borax products. The respondent, Borax Consolidated, Ltd., is incorporated under the laws of the United Kingdom. The respondents, Pacific Coast Borax Company, a Nevada corporation, and United States Borax Company, a West Virginia corporation, are wholly owned subsidiaries of Borax Consolidated, Ltd. The respondent, American Potash and Chemical Corporation, is a Delaware corporation which, during the period covered by this action, was owned and controlled by citizens of the Third Reich. The four companies, two parent and two subsidiaries of one of them, at all times concerned in this action, controlled the entire borax industry not only in the United States but over the world.

This is a suit for treble damages for violation of the antitrust laws of the United States. Allegations in the complaint, none of which is denied, set forth the following facts: Prior to 1929 the respondents engaged in a persistent campaign to liquidate petitioner as a competitor (a full account of which is set forth in the complaint). As a result of this conspiracy petitioner had to shut down its business on or about January 1929. Since that date petitioner has persistently attempted to get back into business but has been prevented by the unlawful acts of the respondents, which through concerted action have succeeded in preventing petitioner from getting access to necessary sources of raw material.

Petitioner has had good cause to believe that it was a victim of a conspiracy in violation of the antitrust laws.

For that reason, ever since it was put out of business in 1929, petitioner has, with the utmost diligence, attempted to discover evidence sufficient to frame a complaint against the respondents. Among other actions petitioner lodged a complaint with the Antitrust Division of the Department of Justice, which with all of its resources was not able to gather the materials essential to the formulation of an acceptable complaint.

The evidence on which this complaint is based was in fact not discovered until 1944, when the American Potash and Chemical Corporation was seized as enemy-owned, brought under the control of the Alien Property Custodian, and a master agreement between it and Borax Consolidated, Ltd., as well as a host of documents attesting the execution of the secret agreement and the acts through which it was made effective, were discovered in its files. In fact, these records laid bare the whole course of concerted action on the part of the two parent companies and their Subsidiaries to crush all independents and to assert a world dominion over the industry. Before the information in the files of American Potash and Chemical Corporation became available petitioner did not have information about the conspiracy or concrete knowledge sufficient for an appeal to the courts.

Until this discovery respondents had kept this illegal agreement and their previous arrangements for concerted action a closely guarded secret. They held themselves out to their competitors to be independent competing corporations. Officials of respondents on inquiry by petitioner denied the existence of any conspiracy and asserted that the market for borax and borax products was free and open.

As a consequence of these disclosures two suits, one civil and one criminal, were filed against respondents and others by the United States. As a result of these suits the illegal agreement and conspiracy became a matter of public record and petitioner, which was still pursuing its investigation, discovered it for the first time. Immediately after the discovery petitioner proceeded with the utmost diligence and brought the present suit.

### **The Issue of the Statute of Limitations**

Respondents in the courts below did not deny the allegations of the complaint. They did file "special answers" with respect to three paragraphs of the complaint which even if eliminated would still leave the cause of action intact. Instead, respondents moved to dismiss the action on the ground that it was barred by the statute of limitations of the state of California. A separate trial on the issue of the statute of limitations was had. At the pre-trial conference, over the objection of petitioner, the judge ruled that the issue was whether at any time from May 17, 1929 to October 10, 1939 petitioner "knew or had good cause to believe" that it had been damaged by reason of any action of the respondents in violation of the anti-trust laws (R. p. 195). The case was sent to a jury on this issue. Mr. Burnham, the principal witness for petitioner, admitted that he had good reason to believe that he had been injured by the illegal acts of respondents. He testified, however, that he knew nothing of the conspiracy set out in "the 1929 agreement" until the United States filed its suits in 1944. His uncontradicted testimony shows that certain of their officials in 1928 denied that there was

any concert of action among the respondents. He further testified that until 1944 petitioner did not possess any specific and detailed facts which would have enabled it to have drawn an adequate complaint against the respondents (R. pp. 356, 690).

Respondents put on no testimony and the trial court directed a verdict for the respondents on the ground that petitioner had good cause to believe as early as 1929 that it was being damaged by the respondents in violation of the antitrust laws.

### **The Decision in the Court of Appeals**

The Court of Appeals affirmed the directed verdict entered by the trial court, holding (1) that the cause of action accrued in 1929, which was the last date on which damage was held to be shown; (2) that the action of the respondents' officers in falsely denying the conspiracy was not fraud or fraudulent concealment under the California cases; and (3) that petitioner as early as 1929 had good cause to believe that it had been driven out of business by acts of respondents in violation of the antitrust laws. The court below read the California statute of limitations\* as an integral part of the antitrust laws; held that such statute applied to the instant case as a matter of law; and ruled that the petitioner was barred from a recovery of the damage it had sustained by reason of a violation of the antitrust laws.

## **II. THE SILENCE OF THE COURT BELOW**

The decision of the court below does not discuss two issues which were fully presented to it and which we be-

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\*C.C.P. 338(1), ignoring C.C.P. 338(4).

lieve are fundamental to the decision of this case. In the first place we assert that the policy of the antitrust law is frustrated if a group of great corporate defendants operating a nationwide conspiracy may cloak themselves with the appearance of competing with each other as independents and at the same time by secret arrangements destroy their real competitors—provided that their secret conspiracy can be successfully concealed during the period covered by the state statutes. It is a matter of common knowledge, testified to by Section 5 of the Clayton Act, that the small competitor is nearly always, as is the case here, in no position to uncover evidence sufficient to formulate an acceptable complaint. It is likewise a matter of common knowledge that vast combinations have the actual power to prevent for long periods of time the discovery of their illegal activities. The issue, therefore, is whether the very purpose of the antitrust laws in making provision for private actions for damages is not perverted or even destroyed if such actions are to be barred by the success of corporate defendants in concealing the evidence of their conspiracies. That issue is not considered or discussed by the court below.

In the second place, the court below, despite the vigorous presentation of the question, did not discuss the question of whether a state statute of limitations must be rigidly followed, even though the result of its application is to defeat the purpose for which the act exists.

### **III. BASIS OF JURISDICTION**

The jurisdiction of this Court is invoked under Section 347, 28 U.S.C.A. (Judicial Code, Section 240, as

amended), petitioner having been denied a right specifically set up and claimed under a Federal statute, namely Section 4 of the Clayton Act (15 U.S.C.A. § 15) granting to a person standing to sue because of damage to his business and property by reason of violation of sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2).

#### IV. THE QUESTIONS PRESENTED

The broad questions presented by this petition are two in number. The first is whether the purpose and policy of the Sherman Act is to place those who violate the law in the position where they may profit, even to the extent of imposing a world-wide dominion over an industry, by successful concealment of a secret conspiracy, and the actions giving it effect, through which they rid themselves of the competition of the independents in the industry.

The second is whether the public policy inherent in the antitrust acts is to be thwarted or defeated by a rigid and literal application of state statutes of limitation.

These broad questions break down into narrower questions, which may be stated as follows:

1. Does the ruling in the case of *Holmberg v. Ambrecht*, 327 U.S. 392, apply only to suits which historically are brought in equity courts, or does it, as set forth in *Bailey v. Glover*, 21 Wall. 342, apply as well to suits which historically are classified as actions at law?

2. May the policy of the Sherman Act be frustrated by a state rule of limitation of action which puts a premium on the successful concealment of secret conspiracies in restraint of trade entered into by combinations of companies which hold themselves out to be independent and proclaim themselves to be competitors?

In addition, the Circuit Court held that in a treble damage action, such as the present, the statute of limitations begins to run as each overt act is performed and not from the date of the last of such overt acts as previously held by this court to be the law.

The Circuit Court held (R. p. 849 (b), also p. 853):

“(b) a cause of action for damages for violation of the antitrust laws *accrues when the damage is sustained* and the statute of limitations begins to run at that time;”

\* \* \* \* \*

“We hold that this is an action at law for damages under Federal antitrust laws and the *only damages for which a recovery might be had are those which accrued and were suffered within three years prior to the filing of the complaint* and the record reveals that none were shown during this period. The court therefore properly held the cause barred by Section 338 (1) of the California Statute of Limitations.”

Such holdings are contrary to the rule laid down by this court.

In *Fiswick v. United States*, 329 U.S. 211; 67 S. Ct. 224 (p. 216 of the Official Report) it is held:

“The statute of limitations, unless suspended, *runs from the last overt act during the existence of the conspiracy*. *Brown v. Elliott*, 225 U.S. 392, 401, 32 S. Ct. 812, 815, 56 L. Ed. 1136. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.”

In *Brown v. Elliott*, *supra*, at page 815, this court has stated:

“And where, during the existence of the conspiracy there are successive overt acts, *the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found.*” (Citing cases).

#### V. REASONS FOR GRANTING THE WRIT

As a practical matter we are persuaded that no greater encouragement can be given to the formation of conspiracies in restraint of trade than the holding of the court that the state statute—irrespective of the diligence of the plaintiff and of the fraudulent concealment of the defendants—is to be literally applied. For such a rule throws a cloak of immunity around law-breakers who for the period of the statute can conceal the evidence of their wrong-doing. The legislative history of the Sherman Act makes it clear that suits for treble damages were instituted by Congress, not to give individuals windfalls, but rather to provide a supplementary instrument of law enforcement. They are not in the category of the collection of ordinary debts. That this is true is demonstrated by the right of individuals to resort to findings in government prosecutions as *prima facie* evidence in their private suits. The ruling of the court below puts a severe and drastic limitation on private suits as a practical means of enforcement. It leaves the matter of how effectively the antitrust acts are to be enforced through private actions to the legislatures of forty-eight states. We cannot conceive that the Congress desired to have this private means of enforcement of the Sherman Act shackled by the

literal application of the multiple laws of the several states of the Union.

In any event, we are convinced that this question is one which is of tremendous importance in antitrust enforcement and that, amid the current confusion in holdings, some guidance in the employment of state statutes in federal antitrust actions should be given by this court.

These questions involve issues of federal law of paramount importance. Although in cases in bankruptcy, *e.g.*, *Bailey v. Glover*, 21 Wall. 342, and *Holmberg v. Ambrecht*, 327 U.S. 392, this court has spoken out plainly, it has never applied the doctrine of these cases within the field of antitrust law.

Such an application has, however, been made of the *Bailey v. Glover* doctrine by the Fifth Circuit. *American Tobacco Company v. People's Tobacco Company*, 204 Fed. 58, and its decision is directly contrary to that of the court below in the instant case. In that case the plaintiff had been injured in its property and business by a secret conspiracy of the two defendants and another. It was some time after it was driven from business that the plaintiff made discovery of the conspiracy. In this case the court held that the plaintiff had been guilty of no laches, since he filed suit within a few months of discovery. It also held that the successful concealment of the "concerted action" from the plaintiff was a "fraud" on the part of the defendants and that for that reason, they were not entitled to interpose as a defense the plea of the statute of limitations.

We cannot believe that the accidental consideration of whether a suit is at law or in equity is the controlling

reason lying back of the *Holmberg* and *Bailey* decisions. In fact, to the contrary, in the *Bailey* case Mr. Justice Miller recites in detail the rationale of the statute of limitation, sets down in specific terms the limits of its use, and holds that where the wrong-doing is concealed or "the fraud is committed in such a manner as to conceal itself" the plea is not to be allowed. And he insists that "we see no reason why the principle should not be as applicable to suits tried on the common law side of the court's calendar as to those on the equity side."

Nor can we believe that the now outmoded distinction between law and equity has any utility either as a matter of justice or in carrying out the purpose of Congress in enforcing a federal right where it has decreed no statute of limitations exists.

In addition to the above considerations we believe that the application of state statutes to federal rights generally is left in confusion by the decision of the court below. As the opinion reads the whole question of whether a state statute shall be literally and rigidly applied or whether equitable considerations and matters involving the purpose of the federal act should be considered depends on whether historically the case can be classified as one in law or equity. The case of *Holmberg v. Ambrecht* lays down a liberal rule with respect to the application of a state statute to the enforcement of federal right. It happened to be a case in equity.

We are convinced that the above questions are of nationwide importance and that clarification of these issues by this court is urgently needed.

**CONCLUSION**

For the reasons recited above, the petitioner asks this court for a writ of certiorari in the instant case.

Respectfully submitted,

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## Brief in Support of Petition for Certiorari

### INTRODUCTION

In this petition, a conscientious attempt has been made to limit the questions presented to those of utmost importance. A reading of the opinion of the court below, for which no summary can be a substitute, will make it clear that the case bristles with issues. Aside from the holding that the case of *Holmberg v. Ambrecht* sounds in equity, and therefore is inapplicable to a private antitrust suit, the court is content to foreclose the major issues presented above, without formally entertaining them. In fact, its

opinion moves rather consistently upon the level of secondary questions. A number of these secondary questions, such as the holding that the suit for triple damages is a private action quite unaffected with a public interest; the isolation of the acts through which it is given effect from the conspiracy in which it is set; the failure to recognize that, in a suit concerned with federally established rights, the choice between state statutes is a federal, not a state matter; the ruling that the statute of limitations cannot be tolled for "fraudulent concealment," because fraud is not "the gravamen" of an antitrust suit; the ruling that in a treble damage action such as the present the statute of limitations begins to run from the performance of each overt act rather than from the last overt act as previously held by this court to be the law; and the neglect to make the allegations in the complaint the frame of reference for any judgment upon the statute of limitations;—all these reflect "ninth circuit law" or run against the weight of authority and, in our opinion, in themselves demand a review of the instant case by this Court. But in the attempt to claim the attention of the court only for issues of greatest consequence, all such secondary questions, as well as the many irregularities which may be noted in the procedure of the trial court, are passed over. In this petition, the Court's attention is directed only to important questions of public policy in the operation of the national economy.

As so limited, the issue in this case is simple and clean-cut. Is a private action, asserting a federal right based upon the antitrust laws to be defeated by a literal application of a state statute of limitation? The court below held,

in effect, that the statute of limitations began to run when the petitioner knew or had good cause to believe that it had been injured by the unlawful conduct of the respondents, and not from the time when the petitioner discovered, or, with due diligence, could have discovered the secret agreement between respondents, which had been successfully concealed for years, and in the execution of which it had been injured in its business and property. The holding is in effect that petitioner had proper access to the courts at a time when it did not possess and could not have possessed, knowledge adequate to framing an acceptable complaint and that when at last it made prompt use of discovery just made, access to the courts was barred. It is, in the alternative, contended by petitioner that the statute of limitations begins to run with discovery or that the respondents because of their fraudulent concealment of the conspiracy and the conduct through which it was executed are not entitled to the plea. To allow the pleas, as the court below has done, allows the wrongdoers to convert a statute designed to give them lawful protection against an untimely suit into an immunity to the law.

## I.

**IN SUITS SEEKING TO VINDICATE RIGHTS ESTABLISHED BY FEDERAL LAW, THE FUNCTION OF THE STATE STATUTE OF LIMITATIONS IS INSTRUMENTAL. IT SHOULD BY THE COURTS BE SO APPLIED AS TO REALIZE, NOT TO DEFEAT, THE OBJECTIVES OF THE ACT OF CONGRESS INVOKED.**

**A. State Statutes of Limitation Were Not Intended for or Shaped to Use in Antitrust Cases.**

This is not a diversity case, where the issue concerns a state-created right, and under the rule of *Guaranty Trust*

*Co. v. York*, 326 U.S. 99, the federal courts are under obligation to follow the state decisions. Instead it is an action grounded on federal law, and seeking to vindicate a federal right.

The antitrust laws contain no statute of limitations either in express language or by implication. In the silence of the Congress "the limitations of time for commencing actions under national legislation" has been left to judicial implications. As to actions of law the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitations. *Holmberg v. Ambrecht*, 66 S. Ct. 582, 584. Thus it is implied that state statutes of limitations are to be absorbed "within the interstices of the federal enactments." It is thus only by implication that state statutes of limitations are brought into play.

These state statutes do not well serve the purposes of federal legislation. In the usual state statute causes of action are resolved into a number of categories and a period of time within which action must be started is fixed for each of these categories. The categories have been framed by state legislatures with local laws primarily in mind. Almost none of them make any provision for antitrust, or, for that matter, for any action grounded in federal rights. In many cases, an antitrust action fits neatly into none of these categories and can usually be made to fit into more than one. To use the state statute rigidly is to employ an instrument never intended for, and no wise adapted to, its federal purpose.

The statutes of limitations of the several states are quite diverse. This diversity has been increased through

their interpretation by the courts of the United States. In their variety they play with equality in respect to the rights established by the federal antitrust laws. In West Virginia, for example, the thinnest sort of a line separates the one-year from the five-year rule. *Momond v. Universal Film Exchange*, 43 F. Supp. 996. In Tennessee, the court had an almost arbitrary choice between statutes running for one, for three and for ten years; and its choice of the ten-year statute for an antitrust action was, by Mr. Justice Holmes, approved by this Court. *Chattanooga Foundry and Pipe Co. v. City of Atlanta*, 203 U.S. 390. Thus, left to the caprices of state statutes as interpreted, the period within which antitrust suits must be brought vary widely not only from state to state but even within the same state. In the application of such statutes to cases involving the federal antitrust laws, there is not only lack of uniformity but confusion as well.

**B. State Statutes of Limitations Must Be Flexibly Adapted to the Administration of the Antitrust Acts.**

The antitrust laws embody our dominant public policy for the national economy. It has by the courts been elevated above ordinary statutes and by Mr. Chief Justice Hughes, in the case of *Appalachian Coal v. U. S.*, 288 U.S. 344, has been called a charter of economic freedom. The several statutes of limitations are mere instruments intended to make effective the objectives of the law. The antitrust acts and the statutes of limitations lie on quite distinct planes. The first is federal, the second is state. The first sets down ends. The second sets down mere means. The statute of limitations, never enacted by Congress but borrowed from state law by the courts as an aid

to administration, must not be allowed to defeat the purpose for which it was invoked.

The statute of limitations must be appraised in terms of its instrumental purpose. It is intended to prevent a plaintiff from sleeping on his rights and to give to him an incentive to diligence. It is intended to insure fairness to the defendant by seeing to it that any complaint against him is brought within a reasonable time. It is intended to insure justice by securing a trial while memories are fresh, the facts are in hand and documents are available. Such is its rationale; and by its rationale must its use, especially when carried out of its own domain into federal law, be guided.

In federal cases the state statute of limitations may be justly and properly applied when the plaintiff willfully delays his suit or fails in diligence in pressing it. But the plaintiff who has been sensitive to his injury, and diligent in his search for the source of his wrongs should not be stripped of his rights because discovery is not made in the prescribed period. And the defendants should be denied the plea who have prevented discovery by successfully concealing the secret conspiracy in which they have been engaged. If a conspiracy in restraint of trade is illegal, surely a conspiracy to conceal the conspiracy and thus to render it immune to the law is illegal. For otherwise the antitrust laws are revised to read that acts in violation remain legal so long as they are successfully concealed. See *Bailey v. Glover*, 21 Wallace 342.

Testimony to the instrumental character of the statute of limitations is given by Section 5 of the Clayton Act (15 U.S.C.A. §16). This section serves three distinct pur-

poses. *First*, it recognizes that when a small business concern is up against a conspiracy of large corporations the gathering of the material essential to a successful complaint is beyond its reach and resources. It then points to the government as an agency of discovery. *Second*, it decrees that evidence presented by the government in an action instituted by it shall be *prima facie* in a private suit covering the same matters. And *third*, it suspends the running of whatever statutes of limitations there may be while the government has a case in the courts. The meaning of all this, as a commentary upon the use of statutes in federal antitrust suits is unmistakable.

It is submitted that the court below was guilty of grievous error in overlooking its instrumental character and in reading the statute of limitations as if it were an integral part of the antitrust laws.

## II.

### **IN THE CIRCUMSTANCES OF THE INSTANT CASE, THE LAW OF THE LAND COMPELS THE REJECTION OF ANY PLEA BASED UPON THE STATE STATUTE OF LIMITATIONS.**

In its validation of the plea of the state statute of limitations, the court below attempts to divest the illegal conduct of defendants of fraud and fraudulent concealment. To that end, pushing the ninth circuit case of *Foster and Kleiser v. Special Site Sign Co.*, 85 F.(2d) 742, beyond its holding, it argues that fraud is not the gravamen of an antitrust offense. The contentions run counter to elementary law. The private antitrust suit is a suit for a wrong. The conspiracy which the statutes outlaw is a conspiracy to commit a wrong; and a conspiracy in restraint of trade takes its legal quality from the char-

acter of the wrong done. A business tort, such as that set forth in the complaint, is touched off by the pursuit of gain. It may or may not involve personal malice; it is prompted by what Mr. Justice Holmes refers to as "disinterested malevolence." *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350. The wrong done, involving deceit, slander of person or of goods, trespass upon business or property, predatory competition, or fraud, fall into one or another of the categories of tort law. A veritable catalogue of offenses involving competitive practices have in Federal Trade Commission proceedings been characterized as "fraud." The suits at law involving abuses of the use of the mails are equally replete with acts of conduct, condemned as "fraud." Yet the frauds revealed there are petty in comparison with the secret conspiracy of Borax Consolidated and American Potash and Chemical to hold themselves out as independents, the while pushing forward their program to drive all their small competitors from the field. The respondents made out of the marketing of borax a crooked game while pretending to be honest concerns operating according to the law. The offenses alleged against them in the complaint, if true, put them at the very top of the hierarchy of frauds.

**1. In Direct Opposition to the Holding Below, the Equitable Rule of *Holmberg v. Ambrecht*, 327 U.S. 392, Compels the Rejection of the Plea of the Statute of Limitations.**

*Holmberg v. Ambrecht*—rejected by the court below, because as a doctrine of equity it has no place in an action at law—is the leading case on the subject. It is a crystallization of a legal doctrine which for decades has

been in the making. In it, for an all but unanimous court, Mr. Justice Frankfurter considers the problems presented in cases which seek to vindicate federal-established rights and the relevant Acts of Congress contain no statute of limitation. He points out that in the silence of Congress state law has been drawn upon to fill in the interstices; insists that "it would be incongruous to confine a federal right within the bare terms of a state statute of limitations;" and insists that "federal courts, sitting as national courts throughout the country" should "apply their own principles in enforcing an equitable right created by Congress." The opinion in specific terms, holds that, when a plaintiff has not slept on his rights the statute of limitations should not begin to run until the fraud is discovered.

The instant case and the *Holmberg* case are much alike; and they present the same issue in respect to the use of the state statute of limitations in cases seeking to vindicate rights granted by Congress. The two cases are alike suits for money damages. In each there has been the successful concealment of fraud, delaying the framing and filing of the complaint. The difference is that, whereas in the *Holmberg* case, the fraud and the concealment thereof is proved, in the instant case it is, through failure to deny the allegations, admitted. The *Holmberg* case is technically in equity because its concern is with bankruptcy; but, had a prayer for an injunction been added, the instant case could have been made to sound in equity. If in the *Holmberg* case, the plea of the statute of limitations is rejected, while in the instant case it is accepted, so substantial a difference in the administration of justice ought not to

depend upon so irrelevant a standard as the historical name by which the cause of action is called. It is to the point that the rationale which supports the *Holmberg* decision applies without qualification to the instant case. If there is a difference, the rule ought to apply *a fortiori* in the instant case; for, whereas in a bankruptcy proceeding, it is only the group of creditors, large or small, which is injured, the very purpose of the suit for triple damage is to vindicate the right not only of the private suitor but of the general public as well.

2. **In Direct Opposition to the Holding Below, the Classic Case of *Bailey v. Glover*, 21 Wall. 342, holds That, in Cases Where the Fraud Is Committed in Such a Manner as to Conceal Itself, the Doctrine That the Statute Begins to Run from the Time of the Discovery Is Held to Be as Applicable at Law as in Equity.**

*Bailey v. Glover*—completely ignored by the court below—is a statement that, in cases concerned with federal rights, its function must govern the use of the state statute of limitations. Mr. Justice Miller, speaking for a unanimous court, finds the limits of the employment of statute of limitations in the rationale which sustains it. “They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights had never existed, or had been satisfied, transferred or extinguished.” But, as he insists, “to hold that by concealing a fraud, or by committing a fraud in such a manner that it conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to

prevent fraud the means by which it is made successful." In a word it does not make sense to insist that a statute designed to insure trial before the evidence is destroyed should be held to bar a trial at a time when at last the evidence is for the first time available.

The rationale set down by Mr. Justice Miller is in no sense dependent upon whether the action falls into the historical category called equity or that called law. In fact he and this Court are of opinion that "the weight of judicial authority, both in this country and in England is in favor of the application of the rule to suits at law as well as in equity." Here it is of note that *Bailey v. Glover* is cited three times in the *Holmberg* decision.

**3. In Direct Opposition to the Court Below, the Case of American Tobacco Company v. Peoples Tobacco Company, 204 F. 58, Directly Applies the Rule of Bailey v. Glover to a Private Suit Seeking to Vindicate a Right Established by Federal Antitrust Law.**

*American Tobacco Company v. Peoples Tobacco Company*—also ignored in the opinion below, in spite of the repeated urging by petitioner—presents a situation almost identical with that in the instant case. Although plaintiff had good cause to believe that it had been injured by the defendants, it did not discover the conspiracy until after the statute of limitations had run against it. The court pointed out that "the course of the wrongful conduct" of the defendants "was at all times concealed from the plaintiff" and that "this conduct and this concealment must necessarily be considered as a fraud on the plaintiff." It was "the lack of a knowledge of the facts" which delayed the action; and, following *Bailey v.*

*Glover*, the court held that the statute of limitations was tolled until discovery.

The three cases are compelling in their authority. The *Holmberg* case sets the principle down as a rule of equity; *Bailey v. Glover* shows that it is equally applicable to suits at law and in equity; and the *Peoples Tobacco* decision gives reality to the doctrine in the field of private antitrust. All three recognize the instrumental character of the state statute when applied in cases which seek to vindicate federal-established right. And all three are in direct conflict with the holding in the instant case of the court below. It makes no practical difference whether the defendants are denied the plea of the statute of limitations, or whether it is held that the statute begins to run from discovery. But it is of importance that by the successful concealment of a secret conspiracy, the respondents should not be allowed to convert a statute designed for their lawful protection into an immunity to the antitrust laws.

**CONCLUSION**

It is submitted that the questions presented here are of national importance; that they present a conflict of authority between the judgment of the court below and decisions of this Court and of the Fifth Circuit; that the issues here raised fall squarely within the "pastoral" or supervisory office of this Court; and that the interests of the lower courts, of litigants, and of the public, demand that they be given authoritative answers. For these reasons, petitioner prays this Honorable Court for a writ of certiorari to the Court of Appeals for the Ninth Circuit in the instant case.

Respectfully yours,

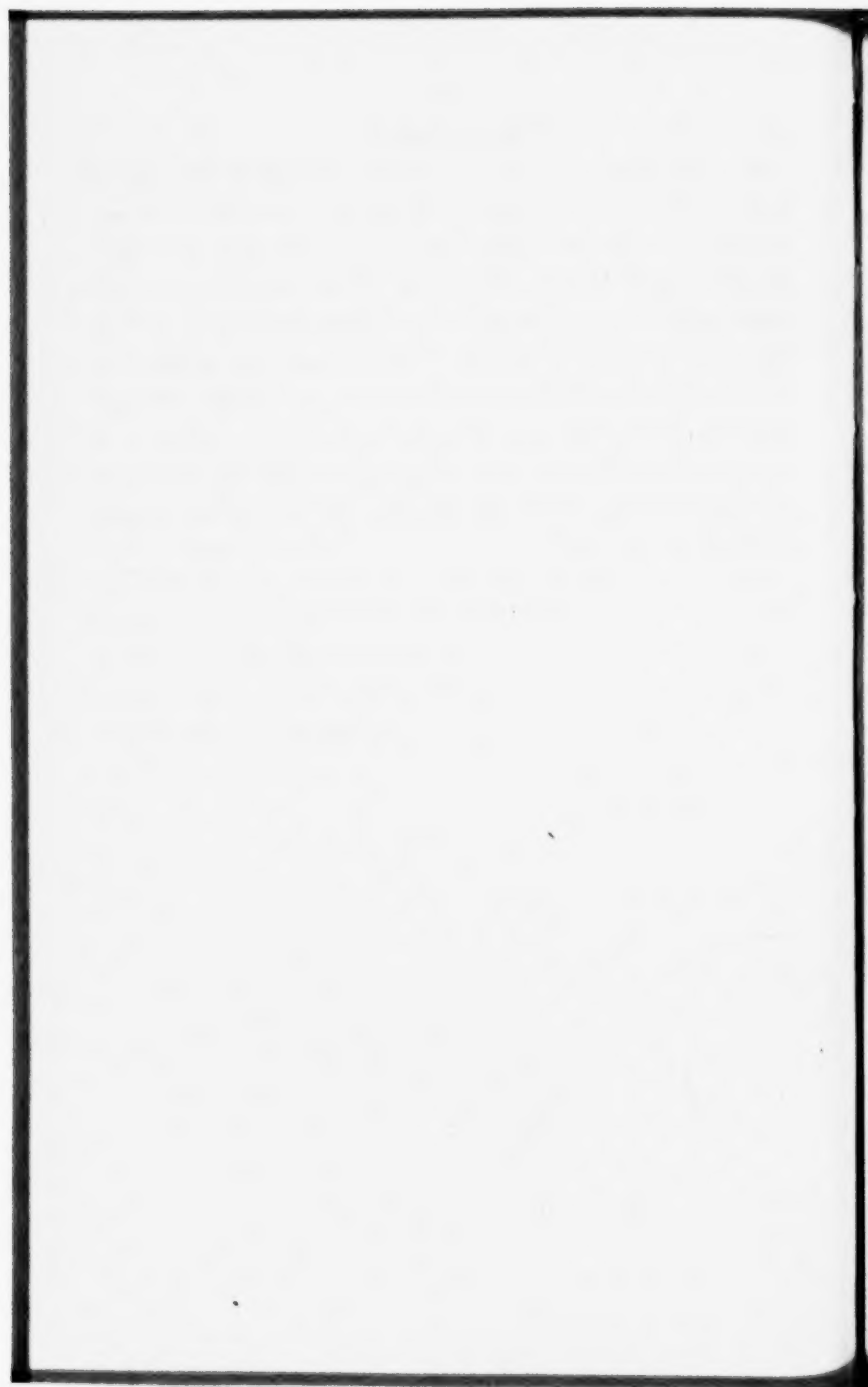
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**MAR 3 1949**

**CHARLES ELMORE** W. O. P. L.  
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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1948.

No. 513.

BURNHAM CHEMICAL COMPANY, a corporation, *Petitioner*,

v.

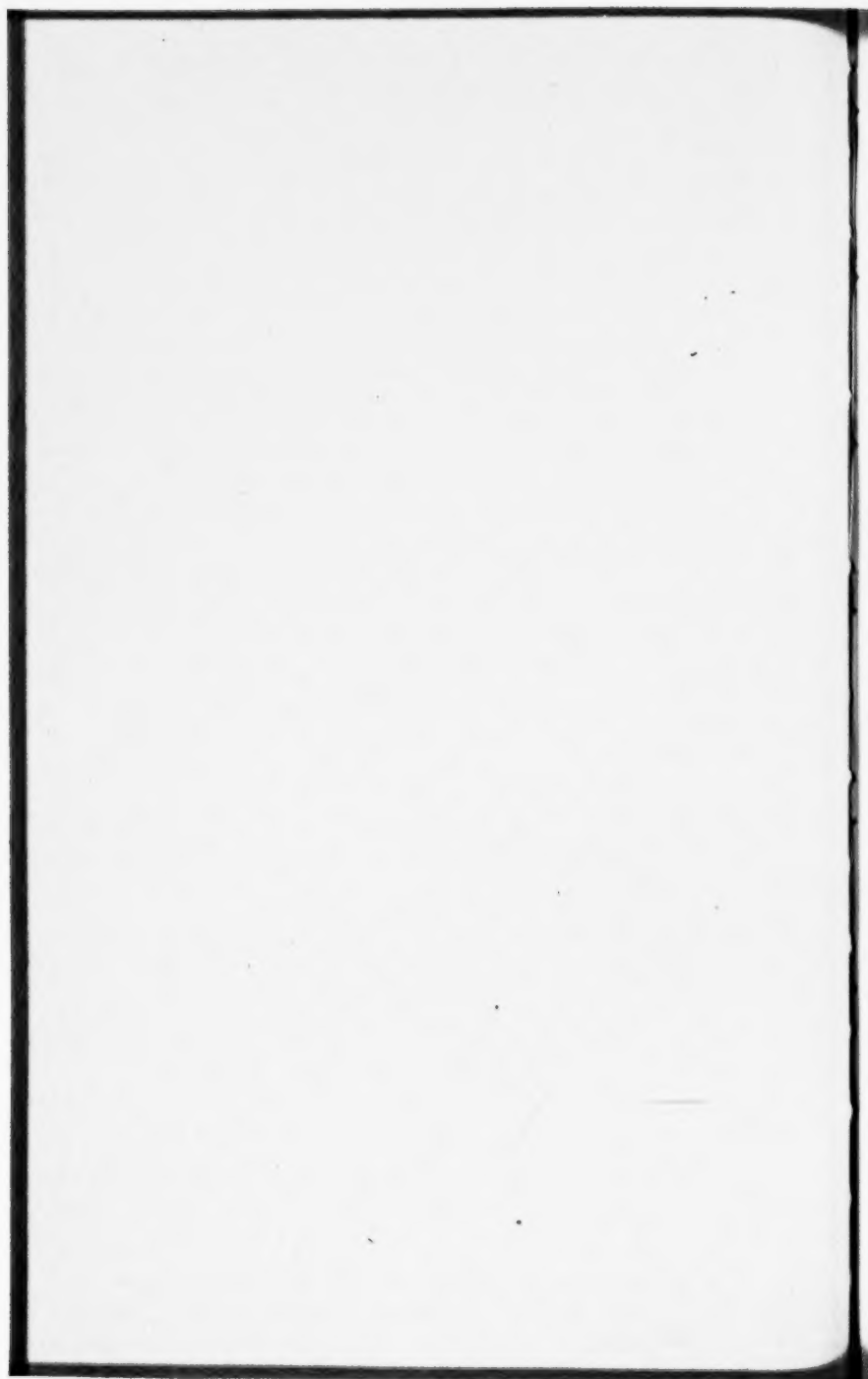
BORAX CONSOLIDATED LTD., a corporation, PACIFIC COAST  
BORAX COMPANY, a corporation, UNITED STATES BORAX  
COMPANY, a corporation, and AMERICAN POTASH AND  
CHEMICAL CORPORATION, *Respondents*.

**MEMORANDUM IN ANSWER TO BRIEFS FOR RE-  
SPONDENTS BORAX CONSOLIDATED, LTD., ET  
AL., AND AMERICAN POTASH AND CHEMICAL  
CORPORATION IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI.**

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**MEMORANDUM IN ANSWER TO BRIEFS FOR RE-  
SPONDENTS BORAX CONSOLIDATED, LTD., ET  
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CORPORATION IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI.**

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

As an answer to the briefs filed by Borax Consolidated, Ltd., et al. and American Potash and Chemical Corporation, the Court is asked to review the Petition for a Writ of Certiorari. The two briefs, supplementing each other,

are beset with infirmities. They lack a frame of reference in the complaint, fail to relate the legal issues to the cause of action, recite as the law propositions which are in dispute, set down as facts matters which have not been tried and infuse into the cases they cite a meaning which is not there. They overlook the axiom that holdings are to be read in the light of the concrete situations before the court. Above all, they fail to join issue on the questions raised in the petition for a writ of certiorari. Their ventures into irrelevance and the needless multiplication of issues make this answer to the respondents longer than we should like.

### **I. The Fundamental Error and the Facts.**

1. **THE FUNDAMENTAL ERROR.**—This action is a private suit for triple damages under the antitrust laws. The Federal District Court, instead of sending the case to trial on the merits, isolated the issue of the statute of limitations from the course of alleged illegal conduct in which it was set, and upon it as so isolated ordered and held a special trial.

In their answers Borax Consolidated (Br. p. 4) and American Potash (Br. p. 5) insist that, since they have not formally answered the complaint, they have neither admitted nor denied the charges therein. If their contentions be accepted as valid, it follows as of course that the frame of relevance in respect to the statute of limitation is the series of allegations in the complaint. The proper question was, "is such a cause of action as is set forth in the allegations of the complaint barred by the statute of limitations?" It would require little short of a full trial to measure all the relevant allegations against the facts; not, for example the statement of Borax Consolidated (Br. p. 2) that no act of the respondents barred the return of Burnham Chemical to the industry. But antecedent to putting the case to the proof—with the allegations neither affirmed nor denied—the court could not go further than to ask whether the statute had run against the cause of action as alleged. Yet the court, in instituting a

special trial, sought—and did—pass upon the statute of limitations apart from a verified knowledge of the facts which alone could give its judgment validity.

The “special trial” was by the presiding judge limited to and predicated upon a single issue, and the finding of facts and the conclusions of law announced by the trial judge stand or fall as that question was properly or improperly put. The trial judge submitted to the jury—which he dismissed before it could return an answer—the issue as:

“At any time from May 17, 1929 to October 10, 1939 did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?”

Petitioner strongly objected to the form of the question, insisting that knowledge of its injury and “cause to believe” that it was due to violation of the antitrust laws by the respondents was not enough. Petitioner contended that the question should have been framed in terms of knowledge of the conspiracy and knowledge adequate to institute a cause of action. (See discussion below, pp. 4, 5.) Such a rewording of the question was rejected by the trial court; the refusal to reword was set forth as error to the Court of Appeals; and in its opinion the Court of Appeals ignored this question entirely.

2. THE TWO WAYS OF PUTTING THE QUESTION.—Here is the fundamental error; and from this error numerous misstatements and false inferences in the adverse briefs proceed. Both Borax Consolidated (Br. pp. 5, 7-9) and American Potash (Br. p. 5) recite facts to the effect that the petitioner did know of its injury within the period specified and at times did have reason to believe that it was due to violations of the antitrust laws by the respondents. All of this is readily admitted by petitioner; nor is there a word to the contrary either in the complaint or in the testimony

of Mr. Burnham. But petitioner contends that knowledge of his injury, and good reason to believe that the respondents were responsible, was not enough. It contends that to formulate a complaint which would stick in court it had to have knowledge of the conspiracy and be able to specify its cause of action. If petitioner is right, all the allegations of knowledge and good cause to believe as set forth by Borax Consolidated and American Potash fall as irrelevant. And the facts found by the District Court have validity only within the narrow limits of the question as put.

3. WHICH WAY OF PUTTING THE QUESTION IS VALID?—Knowledge, cause to believe, or discovery has importance, not in itself but for a purpose. No amount of belief will give shape to the lean and concrete lines of a complaint. If it is to do the suitor any good, knowledge must be of a kind—and there must be enough of it—to support a complaint which is proof against a motion to dismiss. It is true as the adverse parties state that in order to go to court, a litigant does not have to know his whole case. And they are entirely right in saying that interrogatories, depositions and other methods of discovery are open to him. (Borax Consolidated Brief, p. 17.) But such aids to building his case are available to the litigant only after his cause of action has withstood a motion to dismiss; and for that a knowledge of the conspiracy and the outline of the cause of action is essential.

The courts are clear-cut on the kind of a complaint which must be presented and which is proof against a motion to dismiss in an antitrust case. As in *Alexander Milburn Co. v. Union Carbide and Carbon Corp.*, 15 F. (2d) 678 (cert. denied 273 U. S. 757), Judge John J. Parker puts it:

“ . . . it is not sufficient that the declaration be framed in the words of the statute, or that it allege mere conclusions of the pleader. It must describe with definiteness and certainty the combination or conspiracy relied on, as well as the acts done which resulted in damage to plaintiff, and in doing so, must set

forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize."

See also *Rice v. Standard Oil Co.*, 134 F. 464; *Tilden v. Quaker Oats Co.*, 1 F. (2d) 160; *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F. (2d) 885, 887-8, and cases cited there.

It is submitted that on the basis of the "knowledge and good cause to believe" which the District Court held to be sufficient, petitioner could not recite "with definiteness and certainty the conspiracy" of which it now complains. Nor was petitioner able to "set forth the substance of the agreement . . . or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize" at any time prior to the discovery in 1944 of the basic agreement between Borax Consolidated and American Potash and of the file of documents giving a circumstantial account of the formation and execution of the conspiracy. See also the discussion of *American Tobacco Co. v. Peoples Tobacco Co.*, 204 Fed. 58, at pp. 8-9 below.

## II. Errors and Confusion in Respect to the Law.

1. THE FORM OF THE QUESTION.—If it was at all proper for the District Court to raise the issue of discovery, it is submitted that for the reasons just cited, that question was improperly put. If discovery has any function to perform, it is the discovery of fact enough in respect to the plan or scheme of the conspiracy and the acts through which it was executed, to sustain an acceptable complaint.

2. THE FAILURE OF RESPONDENTS TO MEET LEGAL ISSUES.—A careful comparison of the briefs of Borax Consolidated and American Potash with the Petition for a Writ of Certiorari will make it clear that issues raised have not been met. In fact, the adverse arguments are addressed not to the instant petition but to a hypothetical document. Thus it is argued:

A. That petitioner denies that state statutes are, or should be, employed in antitrust cases. The petitioner makes no such denial. Like the substantive provisions of the antitrust acts, the statutes of limitations belong to a system of law. In a case of consequence involving a number of issues, legal values come into conflict. It is in fact the function of judgment to resolve these conflicts. In the resolution it is important that the principal of the limitation of action be given its proper weight. To the plaintiff should be accorded no incentive to sleep on his rights; and the defendant should be saved from having to answer after the case grows cold. But the federal right takes precedence over the state device employed to instrument it. Alien importations into the federal law must be held to their instrumental place. Cases such as *Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1; *Stout v. United Shoe Machinery Co.*, 208 Fed. 646; *Midwest Theatre Co. v. Cooperative Theatres*, 43 F. Supp. 216; *Leonard v. Socony Vacuum Oil Co.*, 42 F. Supp. 369. *Twin Ports Oil Co. v. Pure Oil Co.*, 46 F. Supp. 149, and others cited by Borax Consolidated (Br. p. 19), may properly attest the legitimate use of state statutes in matters concerned with the vindication of federal rights. But no one of them can be made to sanction the conversion of a privilege accorded the defendant into an immunity to the law.

B. That petitioner seeks to establish for itself "a privilege denied to plaintiffs in other actions" and to create "a distinct class of actions subject to no limitations whatever." Again petitioner seeks nothing of the kind. It contends—as it did in its Petition—that a limitation on the time within which actions are to be brought is a salutary device. (Borax Consolidated, Br. 19-20.) But it insists that the use of the device is to be shaped by the rationale which sustains it. It is intended neither to strip the litigant who has been diligent of his rights, nor to confer immunity upon the person who for a fixed period successfully conceals his violation of the law. Its argument is neither

for a special rule in antitrust cases nor for "a class of actions subject to no limitation." Its insistence is that, whatever the class of actions, the rule on limitation should serve the purpose which brought it into being and should not become an iron-clad requirement ritualistically to be invoked to nullify a law or to deny a right.

C. That petitioner demands that this court usurp the functions of the Congress and write into the antitrust laws a statute of limitations. (American Potash Brief, pp. 7-10.) The petitioner demands nothing of the kind. The petitioner insists that the state statutes, which are no part of the acts and were never intended for such a use, are flexible guides which should be used to realize and not to frustrate the statutes which they are called into play to implement. A federal statute, with a rigid period of time within which an action must be commenced, would be no answer to the question addressed to this Court. In the common law the rule against restraints was subject to the rule of reason. Mr. Justice Holmes, dissenting in *Northern Securities Co. v. U. S.*, 193 U. S. 197. And ever since *Standard Oil Co. of N. J. v. U. S.*, 221 U. S. 1—except in respect to price-fixing which is illegal per se—the courts have employed a "rule of reason" to give a flexibility to the substantive provisions of the antitrust laws and thus adapt them to the distinctive circumstances of specific industries. It just does not make sense to find substantive provisions of federal origin to be flexible, and to hold that procedural devices of state origin and no integral part of the antitrust laws to be rigid standards literally and mechanically to be applied. The need is not for new legislation; the question submitted by petitioner is juridical in character.

In sheer fact, the adverse parties are the advocates of judicial legislation. For they seek to lift state statutes from their instrumental office to the level of the substantive provision and to make them an integral part of the antitrust acts themselves.

3. RESPONDENTS' CITATION OF CASES.—But the distinctive art employed by the respondents in the citation of authority in support of their positions does touch off a conflict in respect to the questions on which the Writ of Certiorari is sought.

A. THE MATTER OF CONFUSION.—The statement is made by Borax Consolidated (Br. pp. 11, 15-16) and by American Potash (Br. 7-11) that the matter at issue is in no confusion. The single state usually has a number of statutes, none of which has been designed for antitrust use, yet more than one of which can be made to fit. A classic example is *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U. S. 390. Here the heart of the holding is not, as American Potash (Br. p. 7) and Borax Consolidated (Br. pp. 11, 12) insist, that the state statute of limitations is absorbed in the federal antitrust laws. It is rather than a judge confronted with a number of such statutes shall be guided by the rule of reason in making a studied choice among them. In that case there was available a federal five-year statute, and state statutes providing for limitations of one, three and ten years respectively. The trial court chose the longest period; and in an opinion of Mr. Justice Holmes was upheld. Any doubt about confusion can be stilled by reading the neatly chiseled opinion of Judge Wyzanski in *Momond v. Universal Film Exchange*, 43 F. Supp. 996, where the multiple and diverse laws of two different states, Massachusetts and Oklahoma, entered the same case.

B. THE CONFLICT OF AUTHORITIES.—In the petition there was set down as a reason for granting the writ a conflict of authority between the decision of the court below and the case of *American Tobacco Company v. Peoples Tobacco Company*, 204 Fed. 58, supported by the classic opinion in *Bailey v. Glover*, 21 Wallace 342 and the recent decision in *Holmberg v. Ambrecht*, 327 U. S. 392. Borax Consolidated attempts to eliminate the conflict by bringing the *Peoples'*

*Tobacco* case into harmony with the judgment below. In an exposition (Br. pp. 16-17), not uncharacteristic of respondents' way with a case, it employs a rough surgery to subdue the adverse lines of that opinion to its purpose. It recites a sentence from the trial judge's charge to the jury—lifted out of its context—as if it were from the opinion of the circuit court. It notes, correctly enough, the use of "prescription" rather than limitation of action; and, because it is called by another name, assumes that its concern is with another matter. So it sets the ruling down as civil law, having only local validity. This it does in disregard of the fact that the Fifth Circuit is not content to rest its decision upon Louisiana law, but seeks the authority of, and cites the cases from, the general law. The respondents' brief makes the case hold that knowledge of the litigant's damage—in the absence of just such material as Judge Parker held essential to an acceptable complaint—does constitute discovery. The court, with an eye to the use to which knowledge was to be put, in the *Peoples' Tobacco* case, is insistent that discovery must be discovery of "the fact of a combination and conspiracy between (the) parties." And, that there can be no mistake, the court reiterates that to start the running of the statute the discovery by the would-be plaintiff must be of "the facts which would give it a cause of action."

The handling of *Bailey v. Glover*, 21 Wallace 342, by *American Potash* (Br. p. 12) and *Borax Consolidated* (Br. pp. 13-14), if a bit neater, is equally purposive. In that case the act creating the federal right was supported by a federal statute of limitations. The court there (*Borax Consolidated*, Br. 13-14) "merely held that every federal statute of limitations is to be read as including a provision that if the cause of action is based on fraud, it does not accrue until discovery"; but "the rule of that case has no application to an action at law under a federal statute not containing its own period of limitations." The matter of fraud will be dealt with in section C just below. Here it is enough to

note that the argument is that when the Congress fixes the limitation it contains a flexible proviso, while where the limitation is left to the caprice of state law it is to be literally and inflexibly applied. It is obvious to any student of this Court that Mr. Justice Miller could never have said anything like that. As a great common-law judge he was far more concerned to give full effect to the reasons supporting a legal principle than to the rigid terms in which for the moment the legislature has embodied it. The application of such statutes must be guided by the purposes they are meant to serve. He recites the reasons which make such limitations on action good law; insists that it is not in accord with justice to deny a man his suit when, with diligence, he has not been able to discover his cause of action; and—allowing his rule to go where its rationale carries it—holds that “the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity.”

The holding of *Holmberg v. Ambrecht*, 327 U. S. 392, is handled by Borax Consolidated (Br. 11-12) and American Potash (Br. 7, 8, 9) in the same distinctive way. The *Holmberg* case recites a rule of equity. The case of *Bailey v. Glover*, 21 Wallace 342 anticipates the recent breakdown of the older separation of law and equity. And *American Tobacco Company v. Peoples Tobacco Co.*, 204 Fed. 58, applies the rule directly to a private suit for triple damages under the antitrust laws. Borax Consolidated (Br. 11, 19) and American Potash (Br. 8, 10) are correct in insisting that *Cope v. Anderson*, 331 U. S. 461, does hold a state statute applicable in respect to a federal right (American Potash, Br. 8, 10; Borax Consolidated, Br. 11, 19); but they neglect to state that the court expressly held that the time at which it begins to run presents a federal question. Thus, the line of authority recited by petitioner, in direct conflict with the holding below, invites the issue of the writ asked for.

C. DISCOVERY, FRAUD, FRAUDULENT CONCEALMENT.—A man must discover his cause of action before he can bring suit. Fraud or fraudulent concealment stands in the way of such a discovery. In the complaint allegations of fraud are made. (R. 47, 48, 53.) If, as respondents insist they have not yet answered, in respect to the statute of limitations the cause of action must be set down as alleged. At the "special trial" the issue of fraud and fraudulent concealment at best fell only partially within the issue of knowledge or "cause to believe" as put by the trial judge. And at the conclusion of the hearing the court made no findings of fact. The concealment is admitted. Borax Consolidated protests that the respondents did not hold themselves out to be competitors and asserts that what they did was to deny accusations that they were acting in concert. (Borax Consolidated, Br. pp. 5-6.) The confession is confirmed by the fact that, while the conspiracy to capture the world market was under way, Pacific Coast Borax Company, a subsidiary of Borax Consolidated and a respondent, was engaged in litigation over patent infringement with American Potash. (R. pp. 134, 533, 731.)

The facts are not disputed; the questions of fraud and fraudulent concealment are matters not only of law but of federal law. A private antitrust suit, sounding in tort, may involve negligence, conspiracy, deceit, fraud or other like offense. The fraud does not have to be proclaimed from the housetops in order to arrest the running of the statute. As it is put in *Bailey v. Glover*, 21 Wallace 342:

"To hold that by concealing a fraud, or by committing a fraud in a manner which conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful."

And in *American Tobacco Co. v. Peoples' Tobacco Co.*, 204 Fed. 58, 62, 63, the court points out that the combina-

tion and conspiracy which had prompted the private suit for triple damages for violation of the antitrust laws

“was all the time concealed from the plaintiff and this concealment must necessarily be considered as a fraud on the plaintiff.”

It would be an anomaly in the law to call the sale of a gold brick to a naive yokel a fraud and yet place without that category a gigantic well-concealed conspiracy in the borax industry to put independents out of business and to rob the public of its access to the free and open market.

4. THE PUBLIC INTEREST.—It hardly seems necessary to discuss the contention of Borax Consolidated (Br. pp. 18, 19) that the private litigant in an antitrust action sues for himself, and that the Department of Justice alone can assert the public interest. The contrary has been the law since the Statute of Monopolies—21 Jacobus I, Ch. 3—was enacted in 1623; and the court below, in turning the instant case into an ordinary private tort, disregarded history, the function of the suit and the intent of the Congress. The use of the private suit to serve a public purpose is well established in our system of law. The private antitrust action is a derivation of the old “informer” action. (Compare *Associated Industries v. Ickes*, 134 F. (2d) 694, for the analogy in administrative law.) It has been rid of its obloquy by the provision that the litigant sues in respect to an injury to his own business or property. It is the oldest of all antitrust actions, in use long before resort to the plea in equity and the criminal action. Its public purpose is proclaimed on its face. The injured person’s damage is not tripled in order to confer on him a windfall, but to give an incentive to bring to the attention of the courts a combination, conspiracy or monopoly whose principal victim is the public. It is a recognition that the Department of Justice, with its limited funds, is inadequate to the task of policing the national economy.

5. FEDERAL USE OF STATE LIMITATIONS.—Although state statutes are employed in antitrust cases, the questions attending their use—including which one among several of the same state and when the appropriate statute begins to run—have been generally recognized to be federal in character. *Momond v. Universal Film Exchange, Inc.*, 43 F. Supp. 996; *Rawlings v. Ray*, 312 U. S. 96; *Cope v. Anderson*, 331 U. S. 461. It is this failure to distinguish between the statute which is of state origin and the questions which attend its use which are federal in character that brings a fatal flaw into the arguments which the respondents have put forward.

In the light of the facts, the issues presented and the authorities cited, the court below, in the instant case, with wisdom and justice could have secured the rights of the plaintiffs, could have given effect to the antitrust acts, and could have accorded to the state statute its due by any one of the four following rulings:

A. That the applicable state statute was, as respondents contend, California Code of Civil Practice, Sec. 338(1), and that it should begin to run from the date of the discovery of petitioner's cause of action; or

B. That the applicable state statute was Section 338(4) which is automatically tolled for fraudulent concealment; or

C. That, in its very nature the statute of limitations is a plea in defense; and that because of their fraudulent concealment the respondents were estopped from interposing any such plea; or

D. That, because the facts essential to a just and wise ruling could not be had in advance of the trial on the merits, the court could not in a preliminary hearing rule on the statute of limitations.

It is submitted that the Circuit Court of Appeals was in error in not ruling in terms of these alternatives or of not remanding the matter to the district court with instructions so to rule.

## CONCLUSION.

A British and a German corporation, with their subsidiaries, long before 1929 entered into a conspiracy to assert a worldwide dominion over the borax industry. An independent, driven out of business and blocked in every move to return, seeks to assert its rights under the anti-trust laws. It had knowledge of its injury and at times had reason to believe that it had been caused by the acts of the respondents. But so successfully had the master plan and the steps in its execution been concealed that, despite diligent effort and an appeal to the Department of Justice, the independent was unable to possess itself of the facts wherewith to "set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy or the facts constituting the attempt at monopoly." *Alexander Milburn Co. v. Union Carbide and Carbon Corp.*, 15 F. (2d) 678. When in 1944 the documents disclosing the whole conspiracy were discovered, and the facts therein were made public in a complaint filed in court by the Department of Justice, the injured independent started its suit. Can it be that the substantive provisions of the anti-trust laws which are of federal origin are flexible enough to meet the circumstances of particular cases, and the statutes of limitations, which are imports from state law and necessary to bring the substantive provisions into play, are to be applied with a literal rigidity unknown to the common law? Is the state statute of limitations to be used to strip the independent of his federal rights and to create an immunity for the respondents in their wrong-doing because the resources of the independent were inadequate to the discovery of a secret and closely-guarded conspiracy to possess the world market?

A writ of certiorari should issue, addressed to the United States Court of Appeals for the Ninth Circuit, in order

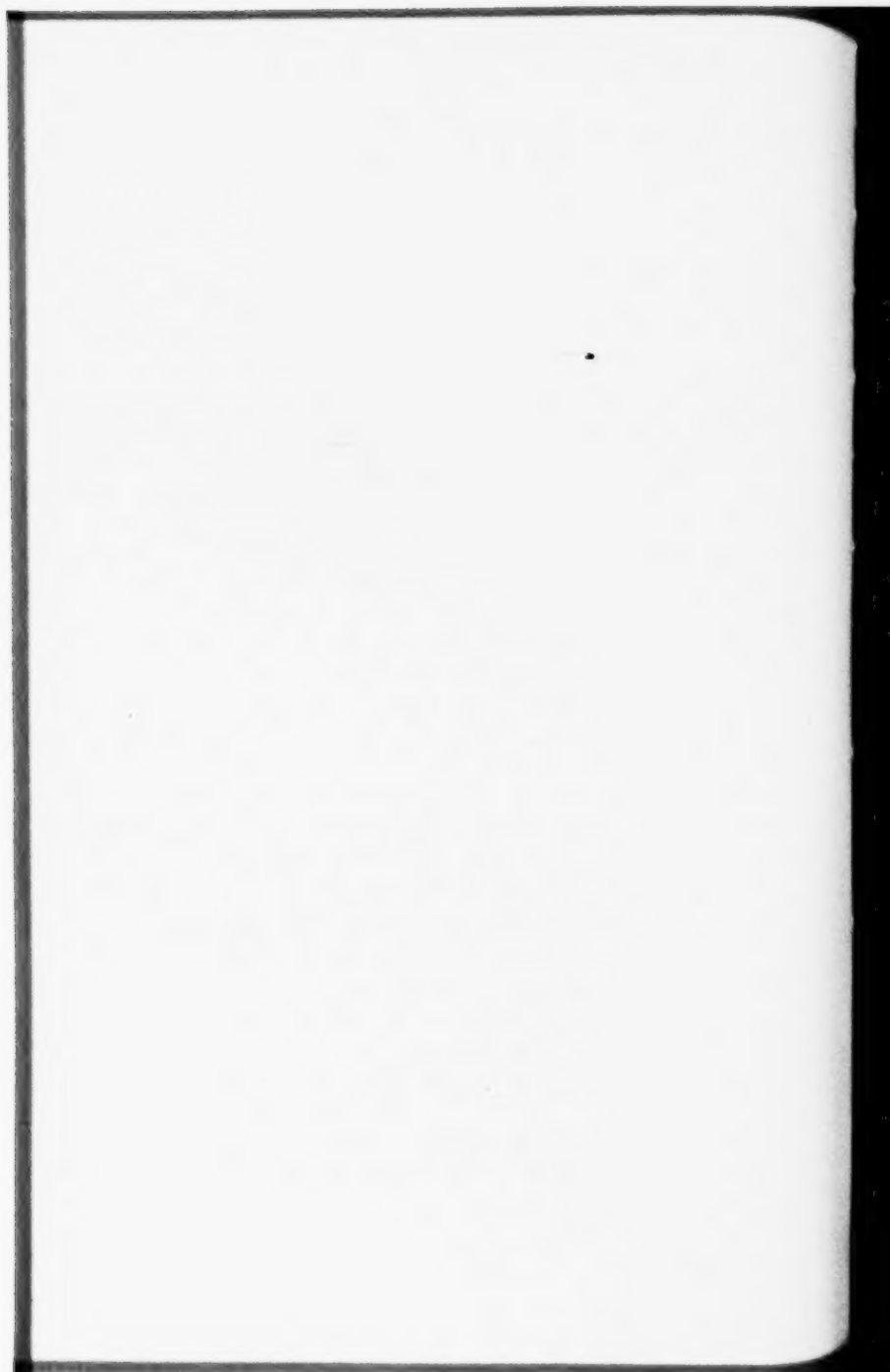
that, after due and full hearing, this Court may make such rulings as in the premises are wise, just and proper.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 513

BURNHAM CHEMICAL COMPANY, a corporation,

*Petitioner,*

vs.

BORAX CONSOLIDATED, LTD., a corporation,  
PACIFIC COAST BORAX COMPANY, a corporation,  
UNITED STATES BORAX COMPANY, a corporation, and AMERICAN  
POTASH & CHEMICAL CORPORATION,

*Respondents.*

## **Brief of Respondents Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company in Opposition to Petition for Writ of Certiorari.**

The petition fails to state or reveal the relevant facts of the case, much of what it does assert as fact is purely imaginative and quite unsupported in the record, and the questions of law which it seeks to raise are, in this case, entirely academic. Indeed, once the facts are fairly stated, there are no issues of law whatever. The decision of the court below is in full conformity with the decisions of this Court and does not conflict with any decision of any other Court of Appeals.

**STATEMENT**

The petition seeks to review a decision of the Court of Appeals (reported at 170 F.2d 569) unanimously affirming a judgment of the District Court which dismissed the action as barred by the statute of limitations. The suit was filed in July, 1945 and was an ordinary action at law to recover damages arising from alleged violation of the antitrust laws.

**A. The Complaint, the Alleged Acts of Wrongdoing, and the Alleged Damage.**

What the complaint charged was that the plaintiff had been damaged in two respects, and two only:

1. In 1924 and 1925—20 years before this suit was filed—respondents allegedly conspired to have the Post Office Department issue a "fraud order," preventing petitioner from using the mails. The fraud order was issued in June, 1925, with the effect of compelling petitioner to abandon the sale of packaged borax (R. 43-45, Complaint para. 73).

2. In 1928, respondents allegedly reduced the price of borax below petitioner's cost of production, in conspiracy, as a result of which petitioner was driven out of business entirely (R. 44-45, 47, Complaint paras. 73, 76). It is alleged that petitioner shut down in January, 1929 (R. 45, 47-48), 16 years before this suit was filed, and it was never thereafter in business (R. 400). Its operations had been entirely on property leased from the government under a mineral lease, and that lease was cancelled by the government for non-payment of rent eight years before this suit was filed (R. 610).

The petition asserts (p. 2) that after 1929 petitioner sought to get back into business but has been prevented by respondents. There is not a word in the record to support this assertion. *No overt act of respondents causing damage to petitioner is alleged in the complaint to have occurred after 1929, and this*

fact was conceded by petitioner (R. 242). The only act of petitioner that might be deemed an attempt to get back into the borax business was an effort to obtain from the government a mineral lease on a certain ore-body (the Little Placer), a wholly different property than its original lease. One of the respondents sought to obtain a patent to the same ore-body. However, the government denied petitioner's application for a lease so long ago as 1933 (R. 50), it also denied a patent to the respondent, and the ore-body still remains in the government's hands. Now petitioner not only did not claim that as a result of the government's denial of its application for a lease it sustained any damage for which respondents could be held liable, but it expressly disavowed any such claim. As noted in the opinion of the court below (R. 833):

"\* \* \* at the trial the court asked appellant's counsel what (overt) act of appellees occurring *after* 1929 resulted in damage to appellant, aside from the futile attempts to secure a Government lease on The Little Placer. Appellant's counsel responded that nothing else had occurred; that appellant did not allege any other incidents in its complaint and that it could prove no damage from The Little Placer incident."

**B. The Special Trial on the Issue of the Statute of Limitations and the Findings Thereon of Both Courts Below.**

The California *Code of Civil Procedure* contains the following provisions:

Sec. 335:

"The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

Sec. 338:

"Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

Since the period of the statute of limitations in California is thus three years, respondents moved to dismiss the action on that ground. Petitioner sought to avoid the statute by claiming "fraudulent concealment" by respondents. Although respondents contended that the facts alleged did not in law constitute fraudulent concealment, the trial court preferred to hear whatever evidence petitioner had to offer on the subject. At petitioner's own suggestion (R. 226, 254-257), the court, under the authority of *R.C.P.*, Rule 42(b), ordered a separate trial of the issue of the statute of limitations before any trial of the merits and directed respondents to file special answers to set up the defense of the statute of limitations without answering the complaint generally (R. 185).

The petitioner would characterize respondents as if the charges of the complaint on the merits were true, asserting that those accusations were admitted because, forsooth, they were not denied. But the *only* issue framed and tried was the statute of limitations, so that petitioner's charges on the merits were neither admitted nor denied (so stated by trial court, R. 329). In response to the same kind of argument in the trial court, the judge said (R. 751):

"It could be the most dastardly conspiracy that human ingenuity could devise and it still won't change the question here to be determined, and that is whether the plaintiff had knowledge of it."

After a trial of over a week, during which petitioner's president was confronted on cross-examination with a score and a half of writings by him throughout the years, the court decided the issue of fact against the petitioner.

Thus the bald fact is that the issue of fraudulent concealment was tried and was decided against petitioner *on the facts*. The utterly devastating character of the finding is shown by the following statement from the District Court's findings (R. 803) quoted in the opinion of the court below (R. 841-842):

"\* \* \* All of the evidence shows both knowledge and good cause to believe on the part of the plaintiff during the period specified in the special inquiry, that its business had been damaged by acts of the defendants in violation of the Antitrust Laws. \* \* \* Statements in writing and under oath by the witness Burnham, who was the managing president of the plaintiff, commencing in 1925 and continuing throughout the years to 1940, show without dispute a continued awareness and knowledge of the plaintiff's cause of action set out in the complaint. Not only that, but these writings make continuous claim as to the responsibility of the defendants for the loss and damage caused to the plaintiff's business."

The court below, after reviewing the lengthy record, commented (R. 244) that the appellant's case had been given a "thorough examination at the hearing on the special issue" and said:

"We think that this judgment of the court was rested not only upon cases which clearly sustain it but *it is also fortified by substantial and convincing evidence of such persuasive and controlling force as to compel its entry.*"

Thus the two courts below concurred in finding that ever since 1925 and 1928 petitioner had knowledge of its alleged cause of action against respondents.

The petition erroneously states that respondents "held themselves out" as competing corporations (p. 3), or that they conspired to conceal their conspiracy (p. 20). There is no allegation whatever in the complaint to any such effect, and on the facts all that the claim comes to is that respondents did not publicly cry "peccavimus" and announce that they had violated the law. Similarly, it is said in the petition (p. 3) that officials of respondents on inquiry by petitioner denied the existence of the alleged conspiracy. But the fact as found by both courts below is that the petitioner separately *accused* two of the

respondents of having conspired to drive it out of business, they then merely denied the accusation, and *petitioner did not believe the denials*. On these matters the trial court's finding (R. 803-804), quoted in the opinion of the Court of Appeals (R. 842-843), is this:

"\* \* \* There has been no evidence in the opinion of the court of any fraudulent representation or concealment by the defendants of the plaintiff's cause of action which deterred the plaintiff from timely presentation of its claim in this court. The so-called Zabriskie and Emlaw conversations do not by any stretch of the imagination go beyond denials of the plaintiff's claim. In no sense do they reach the stature of fraudulent representations or concealment of such an affirmative nature as to in law be misleading to the plaintiff. Moreover, *the evidence without dispute shows the plaintiff did not rely upon the statements made by these two men and hence there is no proof of any misleading character to be attributed to them.*"

In view of the concurring findings of the two courts below, no review of the evidence is necessary, but even a passing mention of some of the items in the large record reveals the utter hollowness of the petitioner's case.

In 1926 in litigation with the Postmaster in the United States District Court for Nevada the petitioner under oath charged that respondents had conspired in violation of the antitrust laws to drive it out of business and to that end had caused the postal fraud order to issue, accused respondents of constituting a monopoly, a "borax trust" and a conspiracy in restraint of trade, and called upon the government to prosecute respondents under the antitrust laws (R. 409-423, e.g., 419, 420). In 1930 petitioner reasserted these charges in the same litigation and added that the intervening price cuts of 1928 were part of the same scheme (R. 561-562, 567).

Following the price cuts petitioner consulted attorneys in late 1928, and, after studying the circumstances, they advised petitioner that it had a good case against respondents under the antitrust laws because the price cuts were designed for the express purpose of killing off competition. They added that any innocent explanations of the price cuts were mere "cloaks and disguises" (R. 510, 515, 518, 519). As petitioner, in 1939, 11 years later, wrote to the Assistant Attorney General in charge of the Antitrust Division, its attorneys had advised it in 1928 that it had "a case against the Trust for violating the Sherman Antitrust Laws," and at all times thereafter petitioner was "convinced" from the circumstances in which the price cuts occurred that they had been designed to drive it out of business, but petitioner had failed to sue at the time for extraneous reasons (R. 398-401). Ten years after this advice of counsel, in 1938, the petitioner again consulted an attorney, this time in New York, and was again advised that it had had a good case under the Sherman Act against respondents but that by 1938 the claim was barred by the statute of limitations (R. 615).

In 1934 petitioner was referring to respondents as "having established, continued and maintained an evil and strangling monopoly in the borax business" (R. 585) and was taking public credit for having "for six years \* \* \* been defending the interests of the people of the United States against the illegal practices of the borax trust" (R. 603). In 1937 the petitioner was informing a Senate Committee that the respondents had driven it out of business by illegal conspiracy in 1928 (R. 593-594). In 1938 petitioner had prepared for its use a lengthy monograph as a history of its business entitled "People of the United States v. Foreign Owned Monopoly," wherein after summing up all the evidence, all facts and circumstances, it concluded that no stronger evidence was needed to establish petitioner's case against respondents: "What stronger evidence,"

it inquired, "would one want to show that the British Borax Trust itself was behind the various steps that have been taken to defeat the Burnham Chemical Co. \* \* \*" (R. 678). In 1939 and 1940 in a series of letters to the Department of the Interior and the Antitrust Division the petitioner reviewed the circumstances of the price cuts, what preceded and what followed, pointed out why innocent explanations of the price cuts did not ring true, and urged that the evidence clearly demonstrated respondents' illegal conspiracy to drive petitioner out of business in 1928 (Cf. R. 618-621, 623-624, 633-634, 639-641). In 1940 petitioner boasted to its stockholders that ever since 1929 it had been publicly calling attention to the fact that foreign owned borax interests were monopolizing borax deposits and "driving out American competition" (R. 655) and expressed gratification that the Department of Justice was about to take action.

During all these years the reason that petitioner did not sue was that it preferred to use the funds made available to it by its stockholders for other purposes (Cf. R. 660-661). Meanwhile, numerous witnesses upon whom respondents would need to rely in meeting petitioner's charges on the merits had died (Cf. R. 537, 659).

### **C. Erroneous Assertions and Half Truths in the Petition.**

To avoid the undisputed facts and the findings of the two courts below concerning its knowledge of its cause of action, the petitioner indulges in a considerable number of erroneous assertions and half truths. In addition to some already mentioned, we may briefly note others. Thus petitioner asserts (p. 3) that the evidence on which the complaint is based was not discovered until 1944 when, on seizure of one of the respondents by the Alien Property Custodian, a so-called master agreement and other documentary evidence was found in its files. This statement is purely imaginative, and neither allegation in

the complaint nor evidence in the record can be found to support it.

The petition further asserts that in 1944 the government instituted proceedings against respondents accusing them of violating the antitrust laws and therein referred to an alleged written agreement made in 1929 of which, says petitioner, it had no previous knowledge. While the complaint in the instant case does refer to the suits by the government in 1944, the 1929 agreement alleged by the government was one which the government averred was first made in November, 1929, i.e., nearly one year *after* the petitioner had already gone out of business; the government made no charges about any pre-existing conspiracy or wrongdoing. Thus, the agreement of November, 1929 was, if it existed at all, one having no relation whatever to petitioner's case (Cf. discussion at page 16 *infra*).

Furthermore, petitioner's complaint averred that the alleged agreement of November, 1929 was a mere reduction to writing of previous "understandings, combinations and conspiracies" (R. 36, Complaint para. 66). And of these alleged previous conspiracies petitioner, as we have seen, was for years convinced that it had sufficient proof.

Moreover, it need hardly be added that the suit by the government was a mere accusation; its allegations were no evidence of their truth, and the assertion in the petition (p. 8) that as a result of the government's suits an illegal agreement or conspiracy became a matter of public record is quite spurious. By the mere filing of the government's suits petitioner did not discover anything more than it had known, for the allegations are presumed to be untrue (Cf. observation of trial court, (R. 279); indeed, they were denied and have never been put to the test of trial.

**ARGUMENT****Summary**

The petition hardly claims that the Court of Appeals failed to apply the law as it now exists. Nor does it suggest that under the California statute of limitations its claim is not barred. What petitioner asks this Court to do is to declare new law.

Thus the petition states (p. 14) that the issue is whether "a private action, asserting a federal right based upon the antitrust laws [is] to be defeated by a literal application of a state statute of limitations." Petitioner does not make clear whether it asks this Court to abrogate entirely the settled rule that state statutes of limitations apply to actions at law on federally created rights where no federal statute of limitations exists, or whether it would only abrogate that rule in antitrust actions, and, if the latter, on what it would base the distinction. Nor does it make clear whether it would have this Court sweep away the state statutes of limitations entirely in private antitrust actions, thereby leaving such actions, alone of all suits on federal rights, wholly free of any statute of limitations, or whether it would only modify the normal application of the state statutes in some respects, and, if the latter, to what extent.

Moreover, petitioner asks this Court to declare new law in respects that can have no possible effect on the outcome of this particular case.

It is elementary that concurring findings of two lower courts are final and will not be reviewed by this Court. *Comstock v. Group of Investors*, 335 U.S. 211, 214; *United States v. Dickinson*, 331 U.S. 745, 751. Petitioner is thus barred by the finding that ever since 1928 it not only had good cause to know but in fact knew of its alleged cause of action against respondents. And petitioner therefore does not indeed assail the finding (except by sly and covert suggestion). In view of this finding, the issues of law that petitioner would raise are all moot.

**I. The State Statute of Limitations Applies to Private Suits Under the Antitrust Laws, but Whether the State Law Be Applied, or Some Newly Created Federal Rule of Fraudulent Concealment, the Petitioner's Case Is Barred.**

For 43 years, since the decision of this Court announced by Mr. Justice Holmes in *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), it has been the law that in suits for treble damages under the antitrust laws the state statute of limitations applies, since Congress itself has prescribed no period of limitations and since the action is purely one at law for damages.<sup>1</sup> This rule, that the state statute of limitations governs, has been applied without deviation in every circuit where the question has arisen. Cf. *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9 Cir.), *cert. den.* 299 U.S. 613; *State of Oklahoma v. American Book Company*, 144 F.2d 585 (10 Cir.); *Momand v. Universal Film Exchange*, 43 F. Supp. 996 (comprehensive analysis by Wyzanski, J.); *Seaboard Terminals Corp. v. Standard Oil Co.*, 104 F.2d 659 (2 Cir.); *Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1 (3 Cir.); *Williamson v. Columbia Corp.*, 110 F.2d 15 (3 Cir.), *cert. den.* 310 U.S. 639.

Only recently the rule has twice been recognized by this Court, once in *Holmberg v. Armbrrecht*, 327 U.S. 392 and again in *Cope v. Anderson*, 331 U.S. 461, 466. The *Holmberg* case is cited by petitioner; yet there this Court (at p. 395) reasserted the rule that state statutes of limitations govern in actions at law brought on federally created rights and cited the *Chattanooga* case, *supra*, as a leading example of that very rule; and in *Cope v. Anderson* this Court cited, to the same effect, the *Chattanooga* case, the *Seaboard* case, *supra*, and the *Bluefields* case, *supra*, all antitrust cases.

1. The action in its very nature, as well as its form, is strictly at law. Holmes, J. in *Fleitmann v. Welsbach Co.*, 240 U.S. 27, cited with approval in *Mercoid Corporation v. Mid-Continent Co.*, 320 U.S. 661, 671; *Meeker v. Lehigh Valley Railroad Co.*, 162 Fed. 354; *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79, 87 (2 Cir.).

Petitioner now asks that this rule be abrogated and that this Court prescribe its own statute of limitations to apply uniformly throughout the country. The fact that for 43 years Congress has contentedly accepted the *Chattanooga* rule makes all the more applicable to antitrust cases the principle (*Holmberg v. Armbrecht*, supra) that in actions at law the silence of Congress is equivalent to a direct pronouncement that it is federal policy to adopt the state statute of limitations. Indeed, the *Clayton Act* in 1914 necessarily recognized the application of state statutes of limitations, when in Section 5 (15 U.S.C., Sec. 16) it provided for suspension of the statute of limitations in certain circumstances, there being no statute of limitations to suspend if not the state statutes. And, if a uniform statute of limitations is now desirable, Congress is fully capable of prescribing one, and it is to Congress and not to the Court that the appeal should be made.

But the utter pointlessness of petitioner's argument is made evident by a simple inquiry. What rule of limitations would it have this Court announce as a federal rule? Apparently the petitioner seeks a rule that would toll the running of the statute of limitations during any period of "fraudulent concealment." But petitioner's case was tested by exactly such a rule. By judicial decision all California statutes of limitations are tolled by fraudulent concealment, whatever the cause of action and whatever the statute and without express provision to that effect in the statute.<sup>2</sup> *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203, 30 Pac.2d 39. It was for precisely this reason that the petitioner was given a trial on this very issue, and it was found that there was no fraudulent concealment.

Consequently, it can make no difference to the petitioner's

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2. The petition (p. 14) asserts that the court below held that the statute of limitations cannot be tolled for "fraudulent concealment." How petitioner could make so violently erroneous a statement is incomprehensible.

case whether the California statute of limitations or some new purported federal rule is applied. In short, the petitioner is asking this Court to issue what could be nothing more than an advisory opinion since it could not possibly alter the result in the case in hand.

**II. A Private Suit for Treble Damages for Violation of the Anti-trust Laws Is Not an Action for Fraud, but Even Under the Statute of Limitations Applicable to Actions for Fraud the Petitioner's Case Is Barred.**

Perhaps petitioner goes further and asks not only that the state statute of limitations be ignored and a federal rule created but also that the federal rule should be the one applied in most jurisdictions to actions for fraud, i.e., the rule that the period of limitations does not begin to run until "discovery" by the plaintiff, even though defendant has been guilty of no acts of fraudulent concealment.<sup>3</sup>

In this connection petitioner cites *Bailey v. Glover*, 21 Wall. 342. The case is not in point. The cause of action there, as here, arose under a federal statute, but, unlike the Sherman Act which does not prescribe its own period of limitations, there the federal statute contained its own statute of limitations. This Court merely held that every federal statute of limitations is to be read as including a provision that, if the cause of action is based on fraud, it does not accrue until discovery. As noted in *Bailey v. Glover* itself, the rule of that case has no application to an action at law under a federal statute not containing its own period of limitations and with respect to which the state statutes therefore apply.

3. If this is petitioner's claim, it is contrary to the position taken by it in the District Court where it conceded that an action for damages under the Sherman Act is not an action for fraud (R. 795) and informed the court that the statute of limitations had run unless petitioner was able to prove as an "excusatory fact" its claim of fraudulent concealment (R. 267, 306).

Moreover, resort to *Bailey v. Glover* is not necessary to find the "discovery" rule for actions based on fraud. Under express statutory provision in California (*Code of Civil Procedure*, Sec. 338(4)), in "an action for relief on the ground of fraud," "the cause of action \* \* \* [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." But this statute applies only where fraud is the gravamen of the action. *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203, 30 Pac.2d 39. It has been universally held, without exception, that the gravamen of an antitrust action for damages is not fraud, and that it is not governed by the statute of limitations applicable to suits for fraud. *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9 Cir.), *cer. den.* 299 U.S. 613; *State of Oklahoma v. American Book Company*, 144 F.2d 585 (10 Cir.); *Strout v. United Shoe Machinery Co.*, 208 Fed. 646. And this is so on principle as well as on unanimous authority. Obviously, not every actionable wrong is a fraud; yet the kind of reasoning used in the petition (p. 19) would make it so. An antitrust conspiracy is a wrong under federal law only because the liability is created by statute (Cf. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497), and thus it fits precisely into the category described by Section 338(1) of the California *Code of Civil Procedure*, which provides three years for "an action upon a liability created by statute, other than a penalty or forfeiture."

But apart from all this, here again petitioner's contention is, on the facts of the present case, wholly pointless, even were it to be assumed that the "discovery" rule applies. It is elementary under both federal and state decisions that something less than "knowledge" is sufficient to constitute "discovery." Cf. *Wood v. Carpenter*, 101 U.S. 135; *Teall v. Schroder*, 158 U.S. 172, 178; *Lady Washington Consolidated Co. v. Wood*, 113 Cal. 482, 45 Pac. 809; *Vertex Investment Co. v. Schwabacher*, 57 C.A.2d 406, 134 Pac.2d 891; *Neff v. New York Life Ins. Co.*, 30 Cal.2d 165, 180 Pac.2d 900; *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670

(9 Cir.), cer. den. 299 U.S. 604; *Jones v. Bankers Life Co.*, 131 F.2d 989, 994 (4 Cir.); *Sacramento Suburban Fruit Lands Co. v. Johnson*, 36 F.2d 935 (9 Cir.).

Yet here, as found by both courts below, petitioner had more than "discovery" as far back as 1928. It not only had good cause to know but in fact it had knowledge of its alleged cause of action throughout all the years since that time.

Petitioner cites *American Tobacco Co. v. People's Tobacco Co.*, 204 Fed. 58 (5 Cir.), a decision wholly destructive of its case. That was an antitrust case which arose and was tried in Louisiana. The court did not apply some federal rule of limitations but the Louisiana law of "prescription," that being the term used in the civil law which prevails in that state. Under that law, prescription apparently never begins to run in any case until the plaintiff knows of his cause of action, unlike the rule in common law jurisdictions where in suits other than for fraud or mistake the statute begins to run regardless of the plaintiff's knowledge, absent fraudulent concealment.<sup>4</sup> Yet even under the Louisiana rule as applied in the *American Tobacco* case, the petitioner here would be barred. The court there approved an instruction (at p. 60) that

"it is a question of fact for you to determine, in connection with this case, whether or not the plaintiff knew, or ought to have known, more than a year before this petition was filed, that he had suffered an actionable injury."

Here both courts below have found that petitioner not only had good cause to know—i.e., "ought to have known"—but that in fact it did have knowledge of its cause of action ever since 1928. And petitioner itself concedes (p. 4) that it had "good reason to believe" that it had a cause of action.

4. Cf. *Rose v. Dunk-Harbison Co.*, 7 C.A.2d 502, 46 Pac.2d 242; *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545; *Scafidi v. Western Loan & Building Co.*, 72 C.A.2d 550, 165 Pac.2d 260; *Neff v. New York Life Ins. Co.*, supra.

All that petitioner really means, when it claims that it did not have "discovery," is that it did not know of some hypothetical specific item of evidence. Here again the contention is not only without fragment of merit in law but, even were the law otherwise, on the facts of this case the petitioner would still be barred. The specific item of evidence referred to is an alleged written agreement, but, as we have seen (p. 9, *supra*), this hypothetical document is one alleged to have been executed in November, 1929, nearly one year after petitioner's alleged cause of action had already accrued. The fantastic nature of petitioner's claim in this connection was well revealed in its brief before the court below, where it said (p. 22):

"Furthermore, actual knowledge by a wronged party that the acts of defendants as charged in a complaint were in themselves performed and carried out in violation of the Anti-Trust laws does not constitute proof of a conspiracy formed *after* the occurrence of such acts and on which conspiracy the action is solely based." [Italics are petitioner's]

Thus petitioner affirmatively asserted that it always knew that the acts which caused damage to it were in violation of the anti-trust laws, but it sought to escape the statute of limitations on the ground that it did not know of a *later* conspiracy formed after those acts were committed and for which it has no right to recover since no acts were done thereunder to its damage.

Apart from the fact just noted, the very case cited by petitioner, *American Tobacco Co. v. People's Tobacco Co.*, 204 Fed. 58, itself disposes of the contention that one does not have "discovery" until he knows of all items of evidence. The court there approved an instruction that

"from the moment he knew he could bring an action against somebody to recover his damages, *although he might not have known who the person was, or he might not have known how he was going to prove his action*, prescription would run \* \* \*" (p. 60).

It is elementary, too, that in order to prove a conspiracy a specific agreement need not be shown (*American Tobacco Company v. United States*, 147 F.2d 93, aff'd 328 U.S. 781) and necessarily, as the trial court said (R. 783), it has never been held that in order to show that a person has knowledge of a conspiracy it must be shown that he knew of a specific written agreement. Moreover, here, the supposed agreement was alleged to be a mere reduction to written form, after petitioner's cause of action had accrued, of the very conspiracy of which it already knew before the writing came into existence! (See p. 9, supra.)

"Discovery" does not mean that plaintiff must have his evidence all "sewed up" before he sues. A party convinced or believing that he has a cause of action must bring suit within the statutory period, and he then may utilize the various discovery procedures—interrogatories, depositions, subpoenas, inspections, etc. Cf. *Scafidi v. Western Loan & Building Co.*, 72 C.A.2d 550, 570, 165 Pac.2d 260, 272; *Fidelity & Casualty Co. of New York v. Jasper Furniture Co.*, 117 N.E. 258, 186 Ind. 566; *Texas Rice Lands Co. v. McFaddin, etc. Co.*, 265 S.W. 888, 890 (Tex.). It is a rare case indeed where a plaintiff, when he starts suit, "knows enough about his cause of action to establish it forthwith by competent evidence." *Bowles v. Pure Oil Co.*, 5 F.R.D. 300. Yet here petitioner was convinced for years that it had all the evidence that was necessary.

In the last analysis, the essence of the petition is really this contention: Despite petitioner's complete conviction throughout the years that it had a case against respondents and despite its possession throughout all that time of both good cause to believe and of knowledge, nevertheless it had a right to defer suit until the government should see fit to assume the burden and expense of breaking trail for it. Of this argument the trial court said (R. 805) and the Court of Appeals quoted with approval (R. 843):

"\* \* \* However, the law does not excuse an untimely presentation upon the ground that the party asserting the claim has been unable to obtain others to aid in the presentation of the claim. The burden of presenting an asserted claim in a legal proceeding always rests upon the party who has and asserts it, and he may not excuse untimely presentation because he has been unable to enlist the aid of others in order to bring about adjudication in the court of his claim."

**III. The Statute of Limitations Begins to Run, with Respect to Private Claims for Damages for Violation of the Antitrust Laws, Against Each Overt Act as It Occurs, but Even if Its Running Were Deferred Until the Last Overt Act Causing Damage, the Petitioner's Case Would Still Be Barred.**

Petitioner complains of the court below that it held that the statute of limitations begins to run, with respect to a private suit for damages under the Sherman Act, against each overt act as it occurs and not from the date of the last overt act.

The Court of Appeals was entirely correct, but here again the question is academic, in this case. As petitioner conceded (see pp. 2, 3, *supra*), it was out of business by January, 1929, and no overt acts occurred after that date that caused it any damage. Thus the statute of limitations ran long before suit was brought, whether it started to run against each overt act as it occurred or only when the last act occurred.

Consequently, it suffices to note briefly that the cases cited by petitioner are not in point because they are criminal cases. So long as there is a conspiracy continuing to a time within the period of limitations, there is a punishable crime, a wrong against the public which the government may vindicate, whether or not any specific person is injured. But a treble damage suit is not brought to vindicate the law; the gravamen of such an action is not the wrong to the public but the damage suffered by the plaintiff which can only flow from overt acts, and

although the overt acts acquire the taint of illegality because of the conspiracy, the private plaintiff's right to recover is based on the acts done and it is for the damage to him that he recovers. All the authorities without exception have therefore held that the rule applicable to criminal cases has no application in a private civil suit, and that there the continuance of a conspiracy has no bearing on the running of the statute. *Foster & Kleiser Co. v. Special Site Sign Co.*, supra; *Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1; *Momand v. Universal Film Exchange*, 43 F. Supp. 996, 1006; *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885, 888, 890 (4 Cir.); *Strout v. United Shoe Machinery Co.*, 208 Fed. 646; *Sidney Morris & Co. v. National Association of Stationers*, 40 F.2d 620 (7 Cir.); *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, 15 F.2d 678, 680 (4 Cir.); *Midwest Theatres Co. v. Cooperative Theatres*, 43 F. Supp. 216, 220; *Leonard v. Socony Vacuum Oil Co.*, 42 F. Supp. 369, 370; *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8 Cir.), cert. den. 314 U.S. 644; *Twin Ports Oil Co. v. Pure Oil Co.*, 46 F. Supp. 149, 152.

### CONCLUSION

Contrary to the petitioner's assertion (p. 10), there is no "current confusion" in the antitrust decisions on the law applicable to this suit. That law is settled and clear and the authorities unanimous. By incantations about the public interest petitioner seeks to create new and nebulous law, and it does so in a case where, on the facts, petitioner is barred by limitations no matter what rule of law were to be created, unless it be a rule that suits under the antitrust laws are wholly immune from any rule of limitations whatever. What was said by this Court in *Campbell v. Haverhill*, 155 U.S. 610, cited by this Court in the *Chattanooga* case, supra, and cited again so recently as *Cope v. Anderson*, 331 U.S. 461, is as applicable here as there:

"But why should the plaintiff \* \* \* be entitled to a privilege denied to plaintiffs in other actions of tort? \* \* \*

why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defences to which the defendant would otherwise be entitled?

"Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever, a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions."

The Sherman Act, of course, reflects public policy, but Congress has provided criminal and civil remedies by the government to vindicate the public interest, and in permitting the treble damage action it does so for the purpose of redressing private injury. *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 750. The treble damage claimant is entitled to no special dispensations. Statutes of limitations are "established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary" (*Kavanagh v. Noble*, 332 U.S. 535) just as much in the case of the treble damage claimant as in any other case.

We respectfully submit that the petition for writ of certiorari should be denied.

Dated: February 11, 1949.

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FEB 21 1949

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948

No. 513

BURNHAM CHEMICAL COMPANY,  
*Petitioner,*

*v.*

BORAX CONSOLIDATED, LTD., PACIFIC COAST  
BORAX COMPANY, UNITED STATES BORAX  
COMPANY AND AMERICAN POTASH & CHEMI-  
CAL CORPORATION,

*Respondents.*

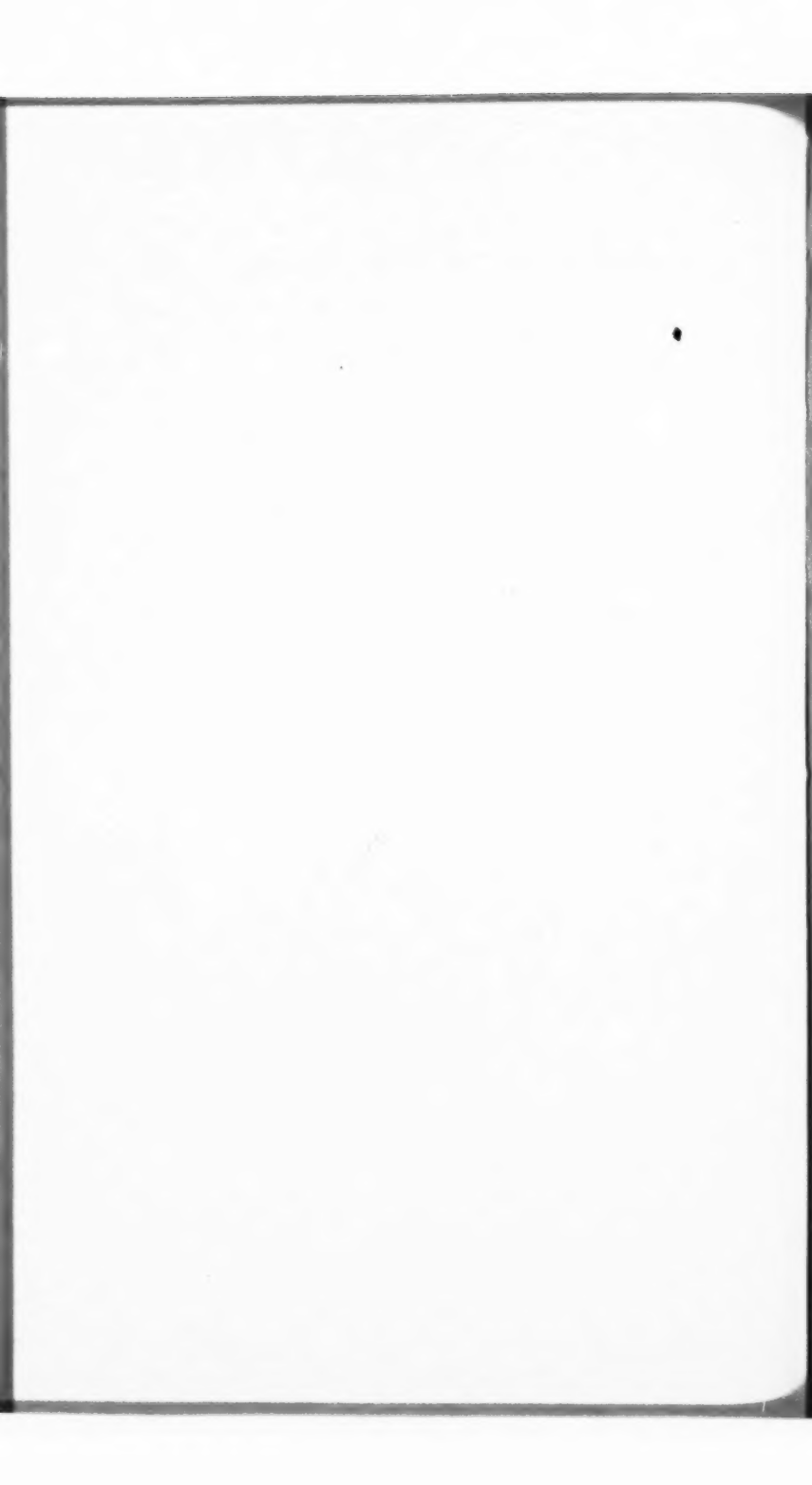
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**BRIEF FOR AMERICAN POTASH & CHEMICAL  
CORPORATION IN OPPOSITION**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948

BURNHAM CHEMICAL COMPANY,  
*Petitioner,*

*v.*

BORAX CONSOLIDATED, LTD., PACIFIC COAST  
BORAX COMPANY, UNITED STATES BORAX  
COMPANY and AMERICAN POTASH &  
CHEMICAL CORPORATION,  
*Respondents.*

No. 513

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**BRIEF FOR AMERICAN POTASH & CHEMICAL  
CORPORATION IN OPPOSITION**

**Opinions Below**

The opinion of the Court of Appeals is reported at 170 F.  
(2d) 569. The oral opinion of the District Court is in the  
record at pages 800-806.

**Jurisdiction**

The judgment of the Court of Appeals was entered on  
October 27, 1948. The petition for writ of certiorari was  
filed on January 17, 1949. The jurisdiction of this Court  
is invoked under Title 28, U. S. Code, Section 1254.

### Questions Presented

The petition does not present any clear-cut questions for consideration. The District Court held, and the Court of Appeals affirmed

1. that this is an action for treble damages under Section 4 of the Clayton Act, (15 U. S. C. Section 15);
2. that such an action is an action at law and not one in equity;
3. that state statutes of limitations are applicable to such actions;
4. that the applicable statute of limitations in this case is California Code of Civil Procedure Section 338(1);
5. that there was no evidence of fraudulent concealment which tolled the statute of limitations.

The first four rulings were based upon an unbroken line of decisions of this and other federal courts. In an effort to obtain review by this Court, petitioner alleges a non-existent conflict in authorities. Under The Questions Presented, petitioner states two "broad questions" which it purports to break down into two "narrower questions" (Pet. 7). It then states a third point but does not advise the Court whether it is seeking review of the Court's ruling in that regard (Pet. 8). Then again, in its brief it claims numerous errors by the court below which it states it will pass over (Pet. 14).

Although the petition does not make clear exactly what rule it asks of this Court, its argument may be considered as requesting one or all of the following:

(1) a ruling that treble damage actions under Section 4 of the Clayton Act are subject to no specific statute of limitations but are governed by the equitable doctrine of laches;

(2) rather than have this type of action subject to varying periods of limitations in the forty-eight states, this Court legislate a federal statute of limitations for private antitrust cases, or for all federally-created rights;

(3) that when a private action under Section 4 of the Clayton Act has been fraudulently concealed from the plaintiff, the period of limitation does not commence to run on the date the damage occurred, but only after discovery by the plaintiff of his cause of action, or of the evidence necessary for the successful prosecution thereof.

### **Statutes Involved**

Section 4 of the Clayton Act (15 U. S. C. Section 15):

*"§ 15. Suits by persons injured; amount of recovery*

*"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."*

The California Code of Civil Procedure, Sections 335 and 338:

Sec. 335:

"The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

Sec. 338:

"Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

### Statement

#### A. The Issue Decided by the District Court

The petitioner commenced this action in July, 1945 in the District Court for the Northern District of California. The complaint alleged a violation of the antitrust laws by the respondents resulting in damage to the petitioner, which it requested be trebled. The acts of damage alleged occurred not later than 1929, more than 16½ years before the suit was commenced.

In an effort to avoid the bar of the applicable California three-year statute of limitations, Section 338(1) of the California Code of Civil Procedure, petitioner contended in the District Court (1) that a conspiracy to violate the antitrust laws constitutes a "fraud" and an action for damages is not barred until the injured party "discovers" the fraud, or (2) that whether or not the conspiracy constitutes a "fraud" it was "fraudulently concealed" from the petitioner, and that the three-year statute of limitations would not begin to run until discovery.

The issue of the statute of limitations was considered by the District Court at a separate trial based upon a special answer (R. 226, 254-257). The District Court held that petitioner had knowledge of its cause of action many years before it commenced action, that there was no fraudulent concealment, and that the three-year statute of limitations was applicable (R. 803-4).

#### **B. Erroneous and Unsupported Assertions in the Petition**

The petitioner singularly avoids record citations, which was not an oversight but due to the lack of any basis in the record for almost all of the statements made. It also seeks to have this Court believe that none of the allegations of the complaint were denied (Pet. 2, 4), while the fact is that the issue before the Court was presented in a preliminary proceeding. No answer on the merits was ever required.

In addition to attempting to create some legal issues which might attract this Court's attention, the petition contains a great deal of colorful but unsupported allegations with respect to this respondent which, petitioner hopes, will create an atmosphere to make up for the lack of issues. The allegation that this respondent, a corporation, was formerly owned and controlled by citizens of the Third Reich (Pet. 2) is entirely irrelevant. The petition also alleges the Antitrust Division of the Department of Justice discovered evidence of the "secret conspiracy" in the files of this respondent only after it was brought under the control of the Alien Property Custodian (Pet. 2). This statement is unsupported by either the pleadings or evidence.

The brief filed by other respondents, Borax Consolidated, Limited, et al., sets forth the nature of the issue presented in the District Court, evidence presented and the

court's decision. To avoid needless repetition, this respondent will not repeat the statements made in that brief.

## ARGUMENT

### Summary

The petition requests this Court to make new law in an area which rightfully belongs to Congress. The petition asks this Court to legislate a federal statute of limitations in private suits for damages under the antitrust laws in place of the state statutes which were ruled applicable by this Court in 1906 in *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, and by a long line of decisions which have followed the *Chattanooga* case without deviation. The justification which the petitioner urges for such judicial legislation is that the "rigid" enforcement of state statutes of limitations should be modified, but the petitioner does not point out how the statutes could conceivably be applied in any other way.

Although the petition is not clear, it appears to argue in the alternative that, in the absence of a federal statute of limitations, the rule should be that state statutes of limitations are tolled where there is a "fraudulent concealment" of the claim for relief by the defendants (Pet. 7). On the record in this case, however, this contention is completely academic as the principal issue decided by the District Court and upheld by the Court of Appeals was this very question of "fraudulent concealment". Upon the face of the complaint the action would have been barred by a "rigid" application of the three-year California statute of limitations

but the District Court granted the request of petitioner for a special trial on the issue of fraudulent concealment. After a full hearing, at which petitioner offered all the evidence it could produce, the court found as a fact that there had been no fraudulent concealment (R. 803-804).

# I

## **This Court Has No Authority to Legislate a Federal Statute of Limitations for Private Actions Under the Antitrust Laws.**

The petitioner argues that federally-created rights are not or ought not to be controlled by state statutes of limitations. However, it has always been the rule that federally-created statutory rights for which the remedy is not penal or equitable are subject to state statutes of limitation, unless, in the statute creating the right, there is an express provision limiting the time during which the action may be brought. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, *supra*. This leading authority was cited with approval by this Court in *Holmberg v. Armbrrecht*, 327 U. S. 392, 395 (1946) the case which petitioner urges is in conflict with the holding of the court below. Congress has recognized the applicability of state statutes of limitations to private antitrust actions by providing for their suspension during the pendency of suits by the Government (15 U. S. C. § 16).

The petition concedes that the antitrust laws contain no federal statute of limitations, either in express language or by implication (Pet. 16). An answer to the contention of petitioner that there should be no statute of limitations in antitrust cases is stated in *Campbell v. City of Haverhill*,

155 U. S. 610 (1895) where a plaintiff took the position that the application of state limitations would defeat the policy of federally-created statutory rights:

“\* \* \* In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture” (p. 616-17).

\* \* \* \* \*

The truth is that statutes of limitations affect the remedy only, and do not impair the right, and that the settled policy of Congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several states” (p. 618).

The inapplicability of the rule of *Holmberg v. Armbrrecht*, *supra*, to this type of action is demonstrated in *Cope v. Anderson*, 331 U. S. 461, 463-4, (1947) in which Mr. Justice Black said:

“There is no federal statute of limitations fixing the period within which suits must be brought to enforce the [federal] statutory double liability of shareholders of insolvent national banks. For this reason we look to Ohio and Pennsylvania law to determine the period in which these suits may be brought. *McDonald v. Thompson*, 184 U. S. 71, 46 L ed 437, 22 S Ct 297; *McClaine v. Rankin*, 197 US 154, 158, 49 L ed 702, 704, 25 S Ct 410, 3 Ann Cas 500; *Rawlings v. Ray*, 312 US 96, 97, 85 L ed 605, 607, 61 S Ct 473. Even though these suits are in equity, the states’ statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which give equity concur-

rent jurisdiction to enforce the legal obligation here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy" [Citing, *inter alia*, *Holmberg v. Armbrecht*, *supra*].

The contention of petitioner that state statutes of limitations do not well serve the purpose of federal legislation is completely refuted by recognition of the application of such statutes to many federally-created rights, such as

*Fair Labor Standards Act of 1938* [29 U. S. C. §§ 201 et seq.]. (Prior to recent enactment by Congress of federal statute of limitations). Right to sue for over-time compensation.

*Reid v. Solar Corporation*, 69 F. Supp. 626, 629 (D. C. N. D. Iowa 1946);

*Abram v. San Joaquin Cotton Oil Co.*, 46 F. Supp. 969, 975 (D. C. S. D. Calif. 1942);

*Loggins v. Steel Const. Co.*, 129 F. (2d) 118, 121 (C. A. 5, 1942);

*Asselta v. 149 Madison Avenue Corporation*, 65 F. Supp. 385, 388 (D. C. S. D. N. Y., 1945) aff'd 156 F. (2d) 139 (C. A. 2, 1946); aff'd 331 U. S. 199 (1947).

*Interstate Commerce Act* [49 U. S. C. §§ 1 et seq.]. (Prior to enactment by Congress in 1906 of federal statute of limitations). Right to recover in cases of discriminatory freight rates.

*Ratican v. Terminal R. Ass'n*, 114 Fed. 666 (D. C. Mo. 1902);

*Patent Infringement.**Campbell v. City of Haverhill, supra.**Merchant Marine Act* [46 U. S. C. § 596]. Right of seamen to recover wages doubled.*Buckley v. Oceanic S. S. Co.*, 5 F. (2d) 545, 546 (C. A. 9, 1925) (rehearing denied);*National Bank Act* [12 U. S. C. §§ 63, 64]. Double liability of shareholders.*McDonald v. Thompson*, 184 U. S. 71 (1902);  
*Cope v. Anderson, supra.**Safety Appliance Act* [45 U. S. C. § 1 et seq.]. Action for statutory negligence.*Nichols v. Chesapeake & O. Ry. Co.*, 195 Fed. 913, 916 (C. A. 6, 1912).*Copyright Law* [17 U. S. C. § 1]. Right to recover treble royalties.*Brady v. Daly*, 175 U. S. 148, 158 (1899).

The petitioner seeks to distinguish private suits under the antitrust laws from all of these other federally-created rights by claiming for the former special importance in antitrust law enforcement. There is no more basis for holding that the public interest requires a uniform statute of limitations in private suits under the antitrust law than for any of these other federally-created rights. The petitioner over-emphasizes the function of private suits, as the primary responsibility for enforcing the antitrust laws is upon the Department of Justice and the Federal Trade Commission, which are vigorously prosecuting suits in every industry in the country.

Even if there were an argument in favor of the policy of having a federal statute of limitations for private actions for violations of the antitrust laws, Congress is the only authority for determining this policy. Where Congress intends to provide uniform limitations on the bringing of an action created by federal statute, it does so, as in the Securities Act (15 U. S. C. § 77m), the Federal Employees' Liability Act (45 U. S. C. § 56) and the Federal Communications Act (47 U. S. C. § 415).

In addition to these instances where Congress has included a statute of limitations in the original statute creating the right, Congress has enacted a federal statute of limitations in other cases where it concluded that state statutes of limitations should no longer apply to a federally-created right. In 1906 the Interstate Commerce Act was amended so as to provide for a federal statute of limitations to take the place of the previously applicable state statutes [34 Stat. 584, c. 359; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 423 (1915)] and in 1947 a federal statute of limitations was enacted by Congress covering rights of action under the Fair Labor Standards Act, which had previously been limited by state statutes of limitations (61 Stat. 87, c. 52, 29 U. S. C. § 255).

## II

### **The Contention That the Courts Below Failed to Give the Petitioner the Benefit of the Rule of Fraudulent Concealment Is Unfounded.**

The second question relates to petitioner's argument that fraudulent concealment of a conspiracy in restraint of trade should toll the state statute of limitations. Whether or not the doctrine of fraudulent concealment is applicable in general to private antitrust actions the District Court did

apply the doctrine under California law in this case. Even though the complaint did not adequately plead fraud or fraudulent concealment, the court granted a special trial before a jury on the question of whether petitioner knew or had reason to know the facts which it now contends were fraudulently concealed from it. At the trial the court found as a fact that there had been no fraudulent concealment.

Although petitioner argues at length that the court below ruled that this statute of limitations cannot be tolled for "fraudulent concealment" (Pet. 7, 9, 14), it concedes "The court below held, in effect, that the statute of limitations began to run when the petitioner *knew or had good cause to believe* that it had been injured by the unlawful conduct of the respondents" (Pet. 15) (*italics supplied*). It appears, therefore, that the crux of petitioner's argument is not that its cause of action was concealed, but only a piece of *evidence*, the alleged secret agreement.

The cases cited by petitioner as in conflict with the holding of the court below, *American Tobacco Co. v. People's Tobacco Co.*, 204 Fed. 58 (C. A. 5, 1913) and *Bailey v. Glover*, 21 Wall. 342 (1875) do not aid petitioner. In the *People's Tobacco Co.* case the court held the question was whether the plaintiff "knew, or ought to have known \* \* \* that he had suffered an actionable injury" (p. 61). The effect of *Bailey v. Glover* was to toll the statute until discovery of the cause of action. The court below found that the petitioner did in fact have knowledge of its cause of action ever since 1928. The issue as tried gave petitioner the benefit of every principle for which it now contends except abolition of all limitations on private antitrust actions. In 1939 petitioner gave to the Antitrust Division information relating to the alleged violations (R. 398-401,

623-624) yet it continued to "sleep on its rights" until after the Government's suit was instituted in 1944. Private plaintiffs are not entitled to delay commencing suit in the hope of obtaining a free ride upon additional evidence gathered by the Government.

### CONCLUSION

It is submitted that the petition presents no question which warrants consideration by this Court. The claimed conflict between the judgment of the court below and decisions of this Court and the Fifth Circuit is non-existent. The only "court-made law" which this Court might consider would be the application of the doctrine of fraudulent concealment. But the necessity for reviewing this doctrine is not presented by the record in this case as the court below did apply it and found as a fact upon the evidence that there was no fraudulent concealment. This finding of fact by the District Court, specifically affirmed on appeal, is not reviewable by this Court. The further request for judicial legislation creating a federal statute of limitations, or a ruling that no statute of limitations is applicable, is not a proper subject for judicial action.

It is respectfully submitted that the petition should be denied.

Dated: February, 1949.

JOSEPH W. BURNS

Fulton, Walter & Halley

MICHAEL F. MCCARTHY

Oliver & Donnally

CHARLES A. BEARDSLEY

*Attorneys for Respondent*

*American Potash & Chemical  
Corporation*



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### Certificate of Counsel.

I, Sterling Carr, attorney for petitioner, am sensitive to the wisdom of Rule 33 which seeks to limit requests for reconsideration of petitions for the writ of certiorari to the exceptional case. Yet, in this instance, a regard for my obligations as a member of this bar, and therefore an officer of this Court, leave me no alternative.

In the cause I represent justice demands that my client have his day in court and that he be permitted to make his proof as to how, in the exercise of his civil liberties, he was driven from, and was kept from returning to, the trade of his choice. I understand clearly that justice must be done under law; and I am persuaded that, if this Court will but permit a full inquiry, with briefs and oral argument, it will agree that the law does not command the unjust result set down below.

But, heavy as are my obligations to my client, my obligations as a member of the bar of this Court are heavier still. And, in this capacity I would fail in my duty if I did not, on grounds hitherto not advanced, call the Court's attention to the public importance of the unsettled issues of law which this cause presents. For these issues are fundamental, alike to the judicial administration of the antitrust law and to the supervisory office which this Court holds in the federal judicial system. Is our "charter of economic liberty" to be preserved in its vitality? Or is it to be undermined by judicial importation of alien matter into what the Congress has written? Does the legislative outlawing of monopoly and of conspiracy in restraint of trade mean what it says? Or is the law's penalty to be visited only upon those who cannot for a stated period keep their wrongdoing secret? The cause here bristles with a host of just such questions; and these, whatever the standards for review, would seem to be worthy of this Court's attention. For the aforesaid reasons, even apart from my obligation to my client, I would be derelict in my duty if I did not call these imperative questions, not yet clarified in the law, to the attention of this Court.

In this spirit, therefore, I, Sterling Carr, who alone among petitioner's counsel, have had an active part in this cause at every stage, solemnly certify that this petition for rehearing is made in utmost good faith and with no thought of delay; that the grounds upon which it is sought are confined to "intervening circumstances" of "controlling effect" and to "other substantial grounds available to petitioner, although not previously presented"; and that, the petition is restricted to the ground herein specified.

STERLING CARR,  
*Attorney for Petitioner.*

1 Montgomery Street,  
San Francisco, Calif.  
1 April, 1949.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

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No. 513.

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BURNHAM CHEMICAL COMPANY, a corporation, *Petitioner,*

v.

BORAX CONSOLIDATED LTD., ET AL., corporations,  
*Respondents.*

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**PETITION FOR REHEARING ON PETITION FOR A  
WRIT OF CERTIORARI.**

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*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Your petitioner, Burnham Chemical Company, in accordance with 33 of the Rules of this Court, respectfully prays for a reconsideration of its petition for certiorari in the above styled case directed to the United States Court of Appeals for the Ninth Circuit, which writ of certiorari was denied to it on March 7, 1949.

### Cause of Action and Limitation.

Your petitioner has over a period of years been injured—and continues to be injured—by a conspiracy in restraint of trade secretly formed and secretly executed by the respondents. It was driven out of the borax business in 1929, and every effort it has made to resume operations has been thwarted by the illegal acts of Borax Consolidated and its confederates. The conspiracy to drive all independents from the industry and to assert a world-wide dominion over the borax market has been implemented by a single unified course of concerted action by the defendants. In this course of conduct the last overt act occurred in 1944 when the conspirators succeeded in preventing Burnham Chemical from securing a lease on the Little Placer claim from the Department of the Interior. This ten acre plot would have secured to your petitioner a source of raw material which would at once have allowed its re-entry into the borax business. From long before 1929 until 1944 the impact of the conspiracy has fallen heavily upon petitioner.

The only issue thus far considered by the courts below is whether the cause of action is barred by the statutes of limitation. Issue is joined on the law which governs the employment of state statutes of limitations in actions seeking to vindicate rights established by the federal antitrust laws. In particular the combat turns upon the question of when the appropriate statutes begin to run. The so-called “trial on the statute of limitations” at the hands of the district judge was predicated upon three assumptions. The *first* was that the statute should begin to run from “discovery”. The *second* was that the action was not allowable if discovery had been made before October 10, 1939. The *third* was that the California three year statute (Code of Civil Procedure, Section 338(1)) was to govern. The date just recited merits a word of explanation. The complaint was filed on July 3, 1945. On October 10, 1942 the Congress

of the United States suspended "the running of any existing statute of limitation applicable to violation of the anti-trust laws . . . now indictable or subject to civil proceedings under any existing statutes—" <sup>1</sup> until June 30, 1945. From October 10, 1942 to the date of filing the statute did not run; and, applying the California three-year rule, the court held that the action was barred if discovering occurred prior to October 10, 1939.

### **The Meaning of Discovery.**

The issue, then, turns on the words "discovery"; in particular upon "discovery" of what? The trial court identified discovery with "good cause to believe". <sup>2</sup> Petitioner contended that discovery must be put in terms of knowledge at least sufficient to get the complaint safely past a motion to dismiss. If discovery is to be invoked to toll the statute of limitations, it is robbed of all function unless put in these terms.

Here is the real issue. There is little contention over the facts. Respondents argue that within the period mentioned, petitioner had "good cause to believe". Burnham in his affidavit (R. pp. 131ff) gives a detailed account of his suspicions and of how by their officials he was lulled into a belief in the fair play of the respondents. Petitioner insists that not until 1944 did it acquire the knowledge adequate to the legal standards of an acceptable complaint; and this fact is not contradicted by respondents. And, as the record indicates (R. p. 34), the conspiracy to dominate the world market was so gigantic, and the concert of action was so effectively kept secret that discovery

<sup>1</sup> Act of October 10, 1942, C. 589, 56 Stat. 781, 77th Cong. 2d Sess. (S. 273, Publ. 740). This Act was extended to June 30, 1946, by the Act of Congress of June 30, 1945 (C. 213, 79th Cong. 1st Sess., § 937, Public 107).

<sup>2</sup> Petitioner's Memorandum in Answer to Briefs by the Respondents, p. 3.

—in the only sense which has any meaning—was far beyond the capacity of the independent business concern. It was only the lucky accident of the seizure of American Potash as German-owned which enabled the Department of Justice, with all its resources, to make a belated discovery. Nor could petitioner before October 10, 1939 have discovered overt acts in the continuing conspiracy which did not occur until after that date, such as the several overt acts by respondents, in attempting to prevent the return of the Burnham Chemical Company to the business through a lease upon the Little Placer claim.<sup>3</sup> If discovery has any part to play in starting the running of the statute, it must be discovery of a legal cause of action. Yet the court below, unconcerned with function, stood by “good cause to believe.”<sup>4</sup>

The refusal to put the issue in terms of “knowledge” was the principal allegation of error in the appeal addressed to the Court of Appeals for the Ninth Circuit. Yet that court ignored this issue—from the wrongful decision of which petitioner insists a host of other errors ensued. Instead, oblivious to the three hypotheses upon which the whole trial was predicated, the appeal court lapsed into reading a chosen one (Section 338(1)) among the several state statutes as if it were a part of the federal antitrust law, and of applying it in a literal and mechanical way to the case at hand. A study of the opinion in *Burnham Chemical v. Borax Consolidated, Inc. et al*, 170 F. 2d, 569, shows that there is there no ruling on the issue of knowledge against good cause to believe. The function of discovery is overlooked; and the significance of the date Oct. 10, 1939 is not recognized. The rigid application of the three year rule, in disregard alike of the circumstances of the case and of the objectives of the antitrust laws, make the decision a

<sup>3</sup> See in detail, pp. 8, 9, below.

<sup>4</sup> Memorandum in Reply to Briefs by Respondents, p. 3.

far greater menace to law enforcement than that of the lower court which in form is affirmed.

In the original request for a writ of certiorari, your petitioner limited itself to two questions—the function of the statute of limitations in an antitrust action and the right of the respondents to the plea—which seemed to it to be of vital public importance. It pointed to the need of clarification where at present the law is in conflict or in confusion; and, in spite of the poetic license taken with the cases by respondents, it demonstrated a sharp conflict between the holding below and the line of authority expressed in *American Tobacco Co. v. Peoples Tobacco Company*, 204 Fed. 58; *Bailey v. Glover*, 21 Wallace 342; and *Holmberg v. Armbrecht*, 327 U. S. 392. Its presentation must have been inept; for the conflict of authority and the importance of the question seem to it to admit of no doubt.

#### **Standing to Sue v. Cause of Action.**

Yet a number of other different and important grounds are available to petitioner. As pointed out in the brief attached to the original petition, the opinion of the court below<sup>5</sup> is replete with conflicts with holdings of other courts and with departures from the law. Thus it confuses standing to sue, accorded by Section 4 of the Clayton Act (15 U. S. C. § 15) with cause of action accorded by Section 1 of the Sherman Act (15 U. S. C. § 1). The private party has standing because he has been “injured in his business or property”. But his cause of action is grounded upon a violation of a substantive provision of the antitrust laws. He can—in fact the tripling of the damage is intended to induce him to—bring the violation of the law to the attention of the courts. The holding below that a private antitrust action is merely “to redress a private injury” and “not (also) for the benefit of the public” (p. 578) is in direct conflict

<sup>5</sup> Petition; by the Burnham Chemical Company, for a Writ of Certiorari . . . and Brief in Support Thereof, p. 14.

with the very purpose of the triple damage suit as set forth by this court in *Bruce's Juices v. American Can. Co.*, 330 U. S. 743, 751-752:

"Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. Such private remedies lose, of course, whatever advantage there may be in the presumed disinterested, public interest standards and expertness of a governmental agency which has the initiative control of retributory measures. It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good three fold, with costs of suit and reasonable attorney's fee."

In a word, whereas one's own injury accords access to the courts and provides a measure for personal damage, it is the intent of the provision to have violations of law harmful to the public brought to the attention of the court. There is no authority for the statement in the opinion below that "the public interest is vindicated (only) by a criminal prosecution."

### **Typical Errors by the Court Below.**

The instant case is of consequence because the enforcement of the antitrust laws is being enfeebled by a host of just such rulings. The opinion below is replete with just such unwarranted concessions which threaten a major surrender. Note, for example in the opinion below, the isolation of the acts through which it is given effect from the

conspiracy in which it is set; the failure to recognize as federal questions the choice between state statutes of limitation and the time when, and the conditions under which, the appropriate statute begins to run; the ruling that the statute cannot be tolled for fraudulent concealment because fraud is not "the gravamen" of an antitrust violation; the ruling that in a triple damage suit the statute begins to run from the performance of each overt act rather than from the last overt act; and the failure to make the allegations in the complaint the frame of reference for any judgment upon the statute of limitation. These, and other rulings of like kind, may not yet have enough authority back of them to be the law of the land. But they do represent a current tendency of federal judges to degrade the antitrust action to mere private law and they do present a threat which if not arrested by this Court is certain to rob the antitrust laws of their vitality and to deflect them from their objective. Surely this Court in its supervisory office over the federal judiciary cannot allow this resort to judicial legislation by the lower courts to go uncorrected.

### **The Little Placer Matter.**

As typical of the way of the court below, note the Little Placer matter. In the period before October 10, 1939, your petitioner did not have and could not have had, knowledge or even "good cause to believe" in respect to overt acts which occurred after that particular date. The court below, using italics to atone for an erroneous statement asserts, that "the Appellant frankly conceded at the trial that while 'making an issue' of the incident as an 'overt act', it *could not prove any damage from it.*" The lack of harmony between this statement and the facts of the suit necessitate reference in some detail to the Record itself. The contest over the Little Placer Property is unique but typical of the way in which big interests prevent the small independent producer from expanding or from getting back into business when once forced out.

Your petitioner, in order to maintain itself in the borax business, on June 1, 1928, filed an application with the Government for a sodium prospecting permit upon the Little Placer. On August 1, 1928, respondent United States Borax Company, in an endeavor to eliminate petitioner from the borax field, filed a mineral application with the Government for the same property. The history of the activities of petitioner thereafter and the opposition that it met from respondents is set forth in the complaint commencing with paragraph 77 (R. p. 48) and extending through paragraph 80 (R. p. 53).

In paragraph 80, it is set forth that all of the actions and activities of defendants in contesting the Little Placer application of petitioner were performed and carried out for the purpose of preventing petitioner from securing a lease upon the Little Placer, with which lease petitioner would have been able again to enter into competition with respondents.

Paragraph 81 (R. p. 53) ties in all of the foregoing allegations of the complaint and alleges that all of the acts done and performed by the defendants were pursuant to and in furtherance of the conspiracy planned and the combinations charged, and for the purpose of controlling and dominating the mining, production and sale of borax in all its forms, *and with the further intent and purpose of injuring, destroying and removing petitioner as a competitor of defendants.*

The Circuit Court, entirely overlooking such portions of the Complaint, failed to pass upon, other than by inference, the important basic claim that the conspiracy alleged was a continuing conspiracy under the doctrine of *U. S. v. Kissel*, 218 U. S. 601.

It is alleged by petitioner that all of the acts and proceedings of respondents as set forth in the complaint were overt acts performed pursuant to the conspiracy in violation of the antitrust laws of the United States which existing for some time previously were formalized in the agree-

ment of 1929. It is contended by petitioner that the conspiracy of 1929 was a continuing conspiracy which did not terminate until the dismissal by the United States Borax Company of its action against the Secretary of the Interior which was subsequent to the 31st of July, 1944.

**Is the Rule of the Continuing Conspiracy Applicable to a Civil Action?**

In antitrust law the rule of the continuing conspiracy is applicable to criminal actions. In suits in equity brought by the government the rule of the continuing conspiracy is clearly recognized. The private cause of action for violation of the antitrust laws has its sanction in the identical provisions under which the government brings a criminal action or institutes a suit in equity. The private antitrust suit serves the same objectives as an action by the Department of Justice. Is the rule of the continuing conspiracy applicable to the private antitrust action? The whole rationale of antitrust law says "yes"; the court below has said "no". Here is a conflict in fundamental law which only this Court can resolve.

The case of *U. S. v. Kissel*, 218 U. S. 601 and many others lay down the rule definitely that in a criminal proceeding under the antitrust laws the conspiracy is to be considered as a continuing conspiracy in the face of a plea of the statute of limitations. So far as we have been able to ascertain, this point has never been passed upon by any of the Federal courts in a civil proceeding under Sec. 15, T. 15, and for that reason it is a case of first impression not only in the lower Federal courts but in this Court as well. We respectfully submit that in these days of growing antitrust litigation of all kinds, the range of applicability of this rule should be definitely settled by this Court. If the rule of the Kissel case had been followed herein the statute would not have begun to run until subsequent to the 31st day of July, 1944. The date of the last overt act of respondents,

is represented by the filing of the mandamus suit on September 1, 1944, (Civil Action No. 25789 D. C., D. C.) against the Secretary of the Interior by respondent United States Borax Company to compel him to issue a patent. (Complaint, paragraph 78, at R. p. 52). The complaint herein was filed on July 3, 1945.

This is a point of first impression and a decision thereon by this Court would settle definitely the law on the question. Its exposition demands a somewhat detailed statement of the facts.

In the activities surrounding the Little Placer, it is alleged that the application of respondent United States Borax Company for a mineral patent was denied on July 31, 1944, and that thereafter on September 1, 1944, such respondent filed an action in the District Court of the United States for the District of Columbia to enjoin the Secretary of the Interior from cancelling the Little Placer Mineral Entry. *This latter date was within one year prior to the commencement of this proceeding.* It is petitioner's contention that such last described activity was the last overt act of the conspiracy.

It is stated in the opinion of the Circuit Court (Note 13, R. p. 850), that during a colloquy between counsel for petitioner and the court, the latter asked what counsel alleged in the complaint to be the last overt act, to which counsel replied that it was the Little Placer claim, but that "We could not prove any damage from it but we make a live issue of that thing in the complaint." From this statement, the Circuit Court (R. p. 850) assumes the petitioner conceded that no damages could be proved as a result of the Little Placer activity. Such is not the fact, as an examination of the record will fully demonstrate. A statement of what actually occurred in court on the trial is set forth in R. pp. 234-242, a reading of which will show that the Little Placer act was urged in the complaint as an overt act performed pursuant to the conspiracy of 1929. The discussion between court and counsel did not in any

respect amount to an admission against petitioner, for such a statement did not constitute evidence of any kind and obviously only referred to the one act of respondent United States Borax Company in filing its petition against the Secretary of the Interior. No separate and distinct damage attributable to that single act was, or could, be isolated from the damage caused by the whole course of illegal conduct on the part of the respondents. The mere filing of such a petition did constitute an overt act, but its harmful impact came into play along with the other acts of respondents which made up the chain of unlawful conduct. This is clearly shown by the following ruling of the Court and the understanding of this rule by counsel on both sides. (R. p. 392), where the following occurred:

"Mr. Harrison: May I ask your Honor to state to the Jury that any statements made on matters are not evidence?

The Court: You mean the statements made by the counsel?

Mr. Harrison: Yes, statements made by counsel.

The Court: I thought I covered that.

Mr. Carr: Yes.

The Court: I spoke of the arguments by the Court and counsel and I meant to include the statements of counsel as well as the statements of the Court. Neither of them are evidence in the case, ladies and gentlemen."

That it was never the intent to waive any damages provable under the facts alleged in the complaint or which might have been produced on the trial, is shown conclusively by the following additional colloquy between the Court and counsel for petitioner R. pp. 785-6:

"The Court: You mean you could not show any damage from the 1929 conspiracy?

Mr. Carr: Under the 1929 conspiracy which we stand on here.

Mr. Harrison: He does not plead any damage under the 1929 conspiracy.

Mr. Carr: Oh, yes, we do. We plead lots of damage.

The Court: Maybe I misunderstood what you just said. I gathered from what you said that you would not be able to show any damage from the 1929 conspiracy.

Mr. Carr: *No, I said if we could not. I do not say we cannot, because we believe we can.* But the overt acts all go to the measure and extent of the damage resulting from the basic conspiracy of 1929. If we cannot, when it comes to the main trial, prove that those damages were incurred as the result of the 1929 conspiracy, of course we cannot recover. But that is not the question here. The question here is, whether or not the statute has run as to the 1929 conspiracy, and nothing else is before this court at this time."

Irrespective of what might have been stated by petitioner's counsel, the result adopted by the Circuit Court was an error; for, even taking such statement at its face value and giving it all the force attributed to it by the Circuit Court, it nevertheless was an erroneous statement so far as the law is concerned. In such situations as the Little Placer damages for prospective or speculative profits *are recoverable* (*Story Parchment Paper Co. v. Patterson*, 282 U.S. 555). And it was error for the Circuit Court to base its decision in the Little Placer matter on an erroneous interpretation of the law. Whether damages could be recovered as the result of the Little Placer activities could only be determined upon the trial of the case on the merits.

The Circuit Court implies that an overt act is not such unless it, in itself, causes damage. This is not a correct interpretation of the law, for an overt act need not necessarily be productive of damage in itself; it can be an overt act without specifically inflicting damage; for instance, the carrying of a letter from one conspirator to his co-conspirator could constitute an overt act and yet no direct or provable damage might result from the mere inert act of

carrying such a letter. Such is the rule laid down by the Ninth Circuit itself in *Marino v. United States*, 91 Fed. 691, pp. 694-5, where it is said:

"The crime is completed when an overt act affecting the object of the conspiracy is done by at least one of the conspirators. An overt act is something apart from the conspiracy, and is 'an act to effect the object of the conspiracy'. *Joplin Mercantile Co. v. U. S.*, 236 U. S. 531, 535, 35 S. Ct. 291, 293, 59 L. Ed. 705. It need neither be a criminal act nor the very crime that is the object of the conspiracy. It must, however, accompany or follow the agreement, and must be done for furtherance of the object of it."

The same rule was announced by the Ninth Circuit in the recent case of *Nye & Nissen v. U. S.*, 168 Fed. (2d) 846. That case involved a conspiracy by which the defendants *planned* to act and where no damage or actual activities were shown. Such *planning* to act was held to constitute an overt act even though not actually fully carried out.

### **The Court Below Ignored Burnham's Uncontradicted Testimony.**

The Court of Appeals for the Ninth Circuit ignored the testimony of Mr. Burnham, president of petitioner (R. p. 356), that during the time set forth in the pre-trial order, namely, May 17, 1929, and October 10, 1939, he did not know that petitioner had been damaged by acts of respondents in violation of the antitrust laws; that he had made diligent efforts at discovery; that at times he believed that he had been driven from, and prevented from returning to, the borax business by acts of the respondents in violation of the antitrust laws. These short periods of belief founded on suspicion caused him to make investigations which turned out to be fruitless. Such fruitless investigations led to long periods of disbelief. Not until late in 1944 did he succeed in obtaining knowledge of the conspiracy and of the course of conduct by which it was made, and was still

being made, successful (R. p. 690). The court below ignored all the detailed statements of Mr. Burnham, such as that during July and August of 1928, he had no knowledge that the respondents were violating the antitrust laws; R. pp. 750-751, that he first acquired the knowledge of the 1929 agreement in the fall of 1944; R. p. 755, that prior to the fall of 1944, he did not have evidence of the existence of such a conspiracy; and R. pp. 760-761, that never prior to the fall of 1944 had he heard of any agreement of respondents in reference to price cuts or monopolization of the borax industry.

### **Intervening Reason for Granting the Writ.**

Since the hearing on the appeal before the Court of Appeals for the Ninth Circuit, *additional evidence of fraud on the part of the United States Borax Company has been found*. Your petitioner has discovered, in respect to the Kramer Borax District, that: (1) The prospectors who located the mining claims concealed from the Government the information that they had found sodium borate; (2) Employees of one of the members of the Borax Cartel helped them conceal the information; (3) The U. S. Mineral Surveyor who surveyed the claim and who was a brother of the Field Engineer for one of the members of the Cartel, signed a sworn affidavit that the locators discovery drill penetrated colemanite at a depth of 375 to 425 feet, whereas in truth, it penetrated sodium borate at that depth in the drill hole; (4) Two other employees of the Borax Cartel signed sworn affidavits at the time the locators were making application for patent to the land, concealing the fact that the discovery drill hole disclosed sodium borate. Their intent was to keep all independents, including Burnham Chemical Company, from securing access to this new source of sodium borate and thus to block independents, including Burnham Chemical Company, from the industry.

When your petitioner applied for the Little Placer property in the Kramer District under the leasing law, employees of the United States Borax Company, in line with the conspiracy to keep out competition filed a false affidavit for the purpose of blocking petitioners efforts to acquire the Little Placer. All of this information is now a matter of documentary record in the files of the Department of the Interior; it was, however, not available to petitioner, at the time of the trial and of the hearing by the Circuit Court for the Ninth Circuit.

### **Substantial Reasons for Granting the Writ.**

If the issues raised here were of no more than private concern, justice would demand that your petitioner be accorded a hearing on the law and the facts, which the courts below have failed to accord it. But petitioner is convinced that its cause here is the cause of the independent business unit which dares to enter a domain of the economy which a small number of large corporations, acting in concert, hold to be their exclusive proprietary province. For these compelling reasons it insists that the writ should be granted.

1. In times like these, the Congress has decreed that the antitrust laws shall be the instrument for holding the economy to its lawful pattern. The maintenance of competition is the effective check upon the concentration of economic wealth and power; likewise the right to a trade is the civil liberty depended upon to release creative energies and to keep alive the dynamic urge in the industrial system. As pointed out above, the vitality of the antitrust laws is now being threatened by a technique of ingenious moves by defendants in antitrust suits designed to keep the question of the merits from ever being reached. The lower courts, none too well versed in the antitrust laws, are yielding before this strategy. The current case, employing the statute of limitations is a representative move in this strategy. While this court should give full effect to the law, it should not

allow legitimate devices, such as the statute of limitations, to be abused with a consequent impairment of the antitrust code upon which the small business unit must rely for its very existence.

2. The decisions of the two courts below constitute judicial legislation. Not only have they made state limitations on actions integral parts of the federal antitrust laws; but, without warrant from the Congress, expressed or implied, they have made the choice between such statutes, the times at which they begin to run, and the circumstances under which they are tolled, matters of state concern or even—as here—arbitrarily subject to the whims of the lower courts. In the instant case discovery, whose sole function is to provide the litigant with the knowledge wherewith to prepare his cause of action, is degraded into mere uninformed belief. Such a ruling is not only judicial legislation, but judicial legislation which in effect nullifies the expressed will of the Congress.

3. The holding of the Court of Appeals, stripped of all ancillary questions and rulings, amounts to this: That, if a small number of large concerns, seeking to establish and to maintain their exclusive dominion over an area of the economy, can keep the evidence of their conspiracy secret until, as literally applied the statute of limitations has run, the corporations acting in concert win immunity from the antitrust laws. This court has repeatedly insisted that its measures of relief shall neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about. *Standard Oil v. U. S.*, 221 U. S. 1, 31 S. Ct. 502, 523. It has repeatedly declared that "Those who violate the (Sherman) Act may not reap the benefit of their violations or avoid the undoing of their unlawful project on the plea of hardship or inconvenience". *U. S. v. Crescent Amusement Co.*, 323 U. S. 173, 189; 65 S. Ct. 254, 262. If, as against such holdings, this honorable Court is now per-

suaded that a compact group which succeeds in keeping knowledge of its conspiracy secret until the statute of limitations has run has thereby become immune to the antitrust laws and may keep the fruits of its illegal conduct, it should frankly say so in no uncertain terms.

### **The Writ and Public Policy.**

To deny your petitioner a writ of certiorari is to frustrate the purposes of Congress in enacting the antitrust Laws.

This honorable Court should take official notice of the fact that the last two Presidents of the United States have urged that the antitrust laws be made more effective and the judiciary without benefit of further legislation can, and is in duty bound to interpret the law to make them more effective and thereby carry out the will of the Congress given eloquent expression by its Executives.

In his monopoly speech before Congress on April 29, 1938, President Franklin D. Roosevelt called for "a thorough study of concentration of economic power in American Industry and the effect of that concentration upon the decline of competition." The President stated that there was a growing "concentration of private power without equal in history" and he declared that this power when its strength exceeded that of the Government was 'fascism' ". The President warned the Nation against "Fascism ownership of Government by an individual, by a group, or by any other controlling power." (R. p. 662)

The President went on and stated:

"The year 1929 was a banner year for distribution of stock ownership, but in that year three-tenths of 1 percent of our population received 78 percent of the dividends reported by individuals. This has roughly the same effect as if, out of every 300 persons in our population, one person received 78 cents out of every dollar of corporate dividends, while the 299 persons divided up the other 22 cents between them" (Defendant's Exhibit AH).

Statistics of the Bureau of Internal Revenue reveal the following amazing figures for 1935:

“Ownership of corporate assets: Of all corporations reporting from every part of the Nation, one-tenth of 1 percent of them owned 52 percent of the assets of all of them . . . also, one-tenth of 1 percent of them earned 50 percent of the net income of all of them.

“ . . . business monopoly in America paralyzes the system of free enterprise on which it is grafted, and is as fatal to those who manipulate it as to the people who suffer beneath its imposition . . . ”

In President Truman's recent message to Congress on January 5, 1949, he stated, among other things, as follows:

“Small business is losing ground to growing monopoly . . .

“We can keep our present prosperity and increase it only if free enterprise and free Government work together to that end.

“If our free enterprise economy is to be strengthened and healthy, we must reinvigorate the forces of competition. We must assure small business the freedom and opportunity to grow and prosper. To this purpose, we should strengthen our antitrust laws by closing those loopholes that permit monopolistic mergers and consolidations . . .

“We stand at the opening of an era which can mean either great achievement or terrible catastrophe for ourselves and for all mankind.

“The strength of our nation must continue to be used in the interest of all our people rather than the privileged few.”

Burnham Chemical Company, the petitioner, is a corporation with approximately 7,000 stockholders who are American Citizens. Respondents are corporations controlled (with one exception, viz., American Potash and Chemical Corporation) by Borax Consolidated, Ltd., a British Corporation. Respondents are the largest producers, refiners and distributors of borax in the world and own and control by fee title or lease practically all of the

borax fields in the United States with the exception of some ten acres known and described as the Little Placer.

### Summary.

The three fundamental questions are—

(1) Can one institute a cause of action grounded in the antitrust law on short periods of belief of violation of the antitrust law when such short periods of belief are founded on mere suspicion?

(2) Can those who conspire to injure another in violation of the antitrust laws be exempt from paying damages, if they keep the knowledge of their conspiracy away from their victim long enough?

(3) If a combination in restraint of trade blocks an independent from getting access to a new source of raw material for 16 years, then at the end of that time, it is found that its activities have been illegal, shall the statute of limitations bar the victimized independent from bringing an antitrust suit?

### CONCLUSION.

For these reasons your petitioner humbly requests this honorable court to reconsider its former decision, to review again the matters now and previously brought to its attention and to grant a writ of certiorari in the above entitled cause addressed to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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*Attorney for Petitioner.*

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San Francisco, Calif.,  
April 1, 1949.



In the Supreme Court

United States

OCTOBER TERM, 1949

No. 513

U.S. Supreme Court

FILED

APR 11 1949

CHARLES BIRGE, JR.

CL

BURNHAM CHEMICAL COMPANY, a corporation,

*Petitioner,*

vs.

BORAX CONSOLIDATED, LTD., a corporation,  
et al.,

*Respondents.*

Reply of Respondents Borax Consolidated, Ltd.,  
Pacific Coast Borax Company and United States  
Borax Company to Petition for Rehearing on  
Petition for Writ of Certiorari.

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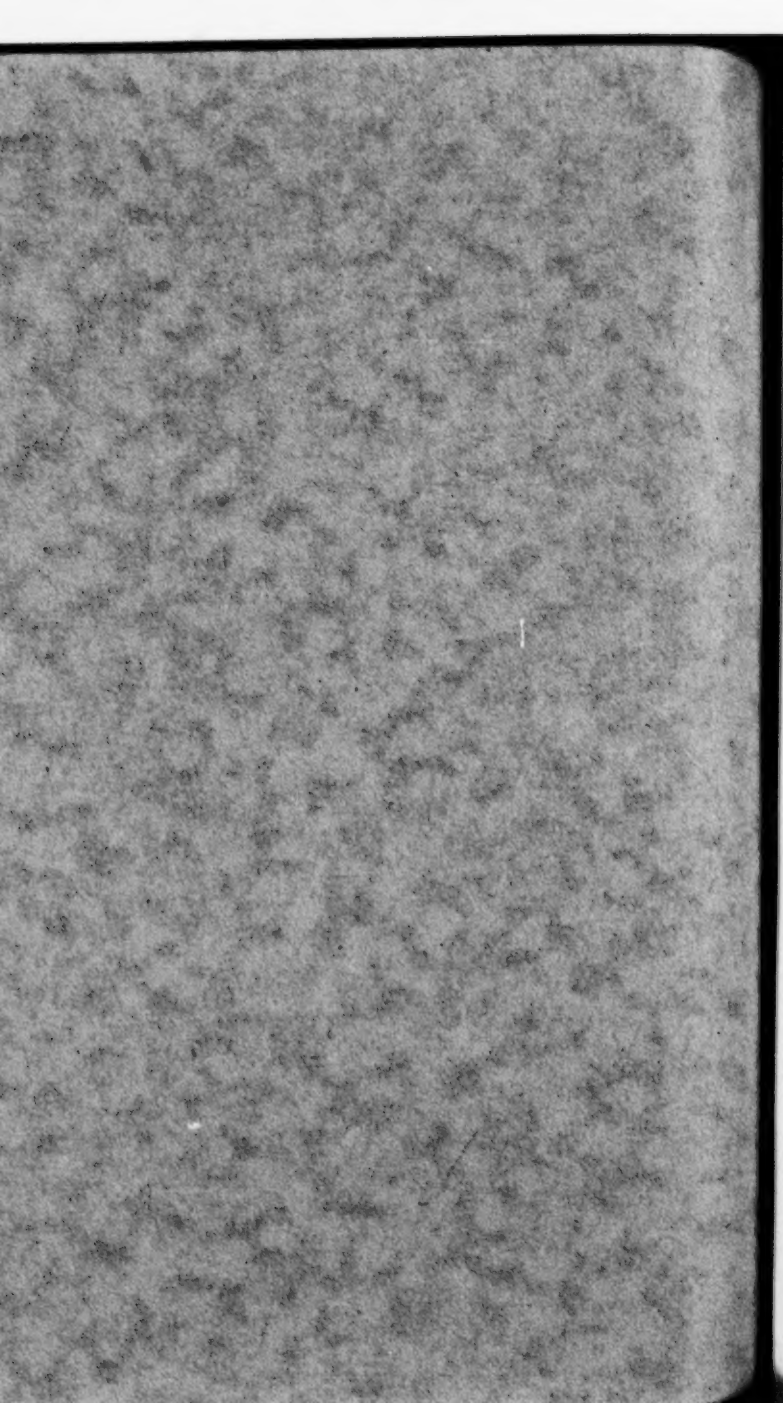
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## Table of Authorities Cited

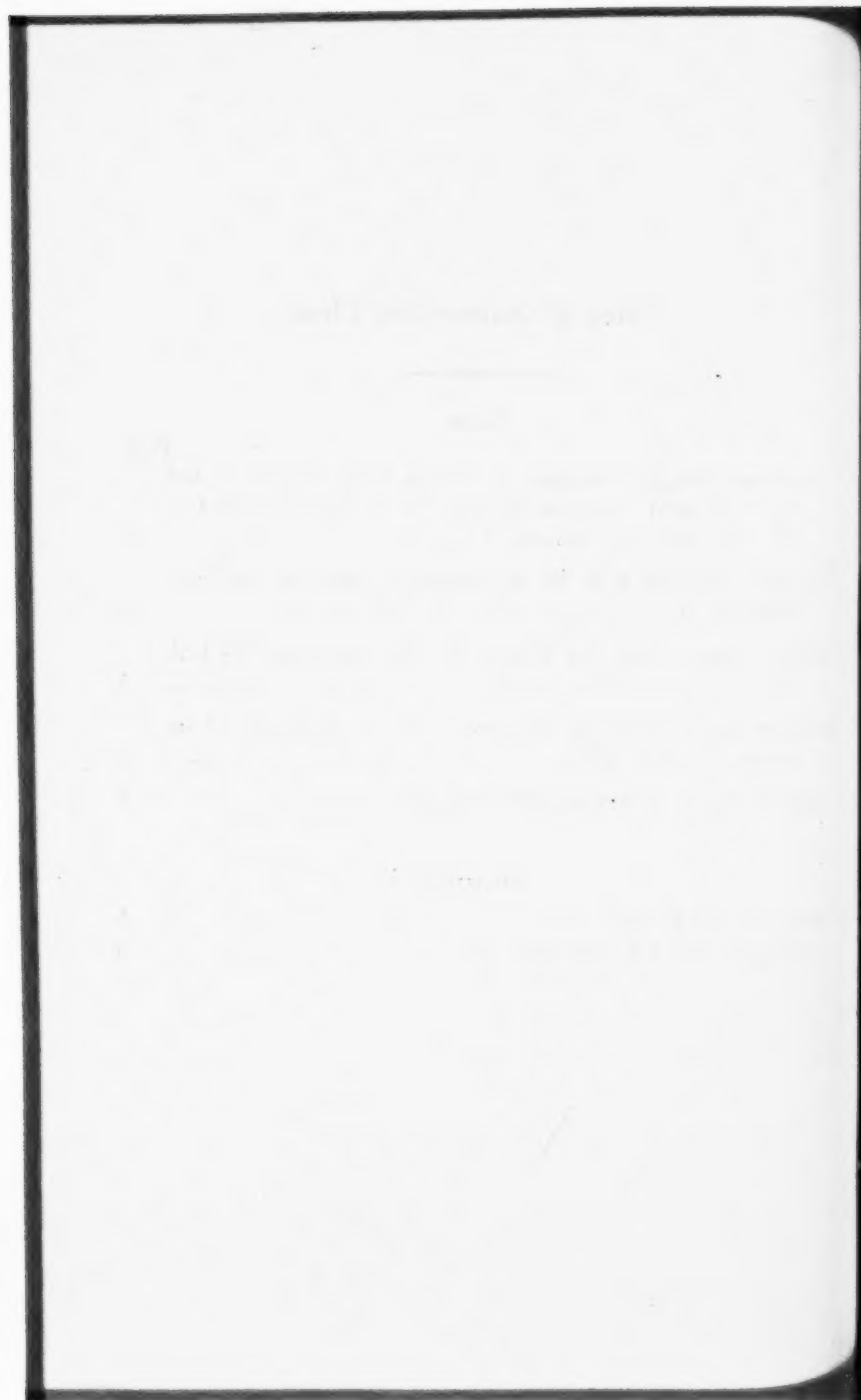
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BURNHAM CHEMICAL COMPANY, a corporation,

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et al.,

*Respondents.*

---

**Reply of Respondents Borax Consolidated, Ltd.,  
Pacific Coast Borax Company and United States  
Borax Company to Petition for Rehearing on  
Petition for Writ of Certiorari.**

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In our brief in opposition to the petition for a writ we corrected a large number of erroneous assertions of fact appearing in that petition. Many of these assertions are repeated in the petition for rehearing, but we shall not advert to them again. We shall confine ourselves to noting that the petition for a rehearing states no ground within Rule 33(2) of the Rules of this Court, and we shall touch principally on what has some semblance of novelty.

The present petition seeks (at p. 3) to draw a distinction between "knowledge" and "good cause to believe" as

constituting "discovery." But the District Court found not only that petitioner for years had had "good cause to believe" but also that it had actual "knowledge," and the court below concurred in this finding (see p. 5 of our brief in opposition to petition for writ of certiorari; also R. 811). On motion for new trial, the District Court disposed of petitioner's argument on exactly this basis. Petitioner merely seeks to have this Court ignore the "two court" rule.

It is thus incorrect to say that not until 1944 did petitioner acquire adequate knowledge, and it is equally incorrect to say that petitioner's assertion to this effect has not been contradicted by us (see our brief in opposition, pp. 4-8, 12, 15).

The petition also asserts (at p. 14) the existence of an "intervening reason" for granting a writ. The alleged "intervening reason" hardly comes within the provisions of Rule 33(2) respecting "intervening circumstances of substantial or controlling effect." It is utterly unlike the sort of circumstances referred to in Rule 33(2), i.e., intervening decisions or statutes, and it merely consists of a claim that petitioner has discovered certain supposed facts alleged not to have been known theretofore. Indeed, it is not claimed that the alleged "new facts" were discovered after denial by this Court of the petition for certiorari, but only that they were discovered after the decision of the court below. Moreover, the "facts" said to be newly discovered have no bearing on the case at all. Finally, the truth, as disclosed by the record, is that for over 15 years the petitioner has been publicly charging the very "facts" which it now asserts it has just discovered, namely, that

years ago respondents obtained patents on mining claims by dishonest acts. It made these public accusations, for example, in 1934 by letter to the Department of the Interior (D. Ex. U, September, 1934),\* again in 1934 (R. 587, 588), in 1936 (R. 588, 591) and in 1938 (R. 672-5).

Much space is devoted in the petition for rehearing to a so-called "Little Placer" matter. Heretofore during the progress of the case, from start to finish, petitioner has placed little or no reliance on this matter, and it conceded that it claimed no damage whatever with respect to it (see our brief in opposition at p. 3).

That concession was no more than what the pleadings, evidence and the law required. It was a frank recognition of an obvious fact. The gist of the allegations of the complaint on the subject (R. 48-53) is that in 1925 certain borate deposits were discovered in Kern County, California; that some of respondents acquired patents from the government on some of these deposits; that petitioner since 1928 has sought to obtain a lease from the United States government, under the Sodium Leasing Act, on one of the deposits known as the Little Placer; that some of the respondents opposed the application and sought to obtain a patent from the government under the mineral laws; that the Department of the Interior declined to give the petitioner a prospecting permit or a lease and also declined to give respondents a patent; and that the Little Placer still belongs to the United States govern-

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\*Extracts from this letter appear at R. 601-603. The entire letter is full of detailed accusations but is not printed in the record since the plaintiff was excused by the court below from printing the exhibits, which were permitted to be before the court without printing (R. 824).

ment, the latter having refused either to lease or patent it to anyone.

The damage claimed in the complaint (para. 81, R. 53) is the exact sum which petitioner alleges that it had invested in developing its brine borax plant at Searles Lake in San Bernardino County, California (para. 73, R. 45). The Little Placer in Kern County is a mining deposit of ore unrelated to the Searles Lake works, and there is no allegation of damages with respect to the Little Placer.

Furthermore, if any claim to damages relative to the Little Placer ever existed, it would itself be barred by the statute of limitations. The complaint alleges that petitioner's application to the Department for a prospecting permit was denied February 9, 1929 (R. 50), and that its application for a lease was denied finally on May 3, 1933 (R. 50). What happened thereafter were merely attempts of petitioner to induce the Department to reopen and consider and an unsuccessful attempt of respondent to obtain a patent for itself. No claim of any "fraudulent concealment" relative to the Little Placer was made either in the complaint or evidence. The assertion (p. 2) that in 1944 respondents did something to prevent petitioner from obtaining a lease is quite unfounded in the record or in reality.

Finally, even if petitioner had suffered damage from failure to receive a lease on the Little Placer, it would have no claim against respondents. The decision whether the property was subject to patent under the mining laws or to lease under the leasing acts, and, if the latter, whether to grant a prospecting permit or lease or to

refuse to grant either, was vested by law in the Department of the Interior (30 U.S.C. Sec. 181, 182, 261, 262; *Oregon Basin Oil & Gas Company v. Work, Secretary of Interior*, 273 U.S. 660; *United States v. Wilbur*, 283 U.S. 414). The proximate cause of petitioner's failure to obtain a lease was the determination of the United States government acting through that Department. A complaint states no cause of action for damages under the Sherman Act where the damages result from acts of government officials. *American Banana Company v. United Fruit Company*, 166 Fed. 261, aff'd *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (per Holmes, J.). Recovery of damages under the Sherman Act requires "violation of a legal right," the rejection by the Department of the Interior of petitioner's application for a lease was a determination that petitioner had no legal right to a lease, and therefore no cause of action could exist here. *Keogh v. Chicago & N. W. Ry. Company*, 260 U.S. 156 (per Brandeis, J.); *Maltz v. Sax, et al.*, 134 F.2d 2 (7 Cir.), cert. den. 319 U.S. 772. The Department of the Interior has itself stated that there is no basis for assuming that, but for respondent, petitioner would have been successful in obtaining a lease. In January and February 1947 it denied still another application by petitioner for a lease, already "finally rejected" in 1933, and still another motion for a rehearing, and it rejected as unsound petitioner's contention "that it should be granted a lease as a matter of equity because a foreign borax combine was working against it from 1928 on." (See Exhibits introduced at R. 819.)

The petition asserts (p. 9) that no federal court in a civil proceeding under Title 15 U.S.C. Sec. 15 has ever

passed on the question of continuing conspiracy as related to the statute of limitations. On the contrary, it has been passed upon repeatedly, and the law is well settled (see cases cited at page 19 of our brief in opposition).

It is respectfully submitted that the petition for rehearing should be denied.

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